Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-670

SECOND AVENUE LIMITED DIVIDEND HOUSING ASSOCIATION, et al,

PETITIONERS,

v.

CARLA ANDERSON HILLS, Secretary Department of Housing and Urban Development, et al,

RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the judgments of the United States Court of Appeals for the Sixth Circuit entered in this above case.

OPINIONS BELOW

The opinion of the District Court (App. A, infra, pp. 1-46) is unreported. The opinion of the Court of Appeals for the Sixth Circuit (App. B, infra, p.47) is unreported and its decision denying rehearing (App. C, infra, p. 49) is unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was made and entered on April 8, 1976, and a timely petition for rehearing en banc was denied on May 25, 1976. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

I. Whether Petitioners are entitled to have the District Court decide the merits of the disputes of the particular issues alleged in their First Amended Complaint?

II. Whether the District Judge's determinations that the Court lacked jurisdiction and that the First amended Complaint failed to state causes of action are fatally incompatible?

III. Whether the District Judge's determination that Count XII of the First Amended Complaint failed to state causes of action, on the authority of Parker v. Brown, 317 U.S. 341, that the "governmental agencies and officers do not fall within the purview of the anti-trust laws," is clearly erroneous?

IV. Whether the District Court erred in dismissing Petitioner's First Amended Complaint on the pleadings findings that Petitioners did not have standing to bring the suit and that the First Amended Complaint did not state causes of action upon which relief can be granted?

V. Whether the District Court erred in determining the standard applicable in testing the sufficiency of the First Amended Complaint for subject matter jurisdiction?

CONSTITUTIONAL PROVISIONS, STATUTES, AND FEDERAL RULES INVOLVED

The pertinent portions of the Fifth, Ninth, Thirteenth, and Fourteenth Amendments to the Constitution of the United States, laws of the United States and Federal Rules of Civil Procedure, to wit:

(5 U.S.C. 702), (12 U.S.C. 1702), (28 U.S.C. 1331, 1343(3) and (4), (42 U.S.C. 1981, 1982, 9183 and 1985), (42 U.S.C. 200d), (42 U.S.C. 3605 and 3612), (42 U.S.C. 3939), Fed.R.Civ.P. Rules 12(b) (1) and 12(b)(6), 28 U.S.C.A. set forth in App. D at pp. .

STATEMENT OF THE CASE

The First Amended Complaint

The District Court action was brought by three sets of Plaintiffs.

Second Avenue, a Michigan Limited Partnership, was organized pursuant to the Michigan Uniform Partnership Act and the State Housing Development Authority Act of Michigan. The organization and operation of Second Avenue was and is supervised by the Michigan State Housing Development Authority

("MSHDA"). Second Avenue is a limited dividend partnership among whose purposes is to rehabilitate and develop the Second-Hendrie Project for low and moderate income persons and social, recreational, commercial and communal facilities for its tenants. All of Second Avenue's members are Black Persons. Second Avenue is a participant and recipient under the federally assisted programs.

Hood is a member, limited partner and general partner of Second Avenue, is a Black Person, a resident and taxpayer of Detroit. Eley is a Black Person, a former tenant and displacee of the Second-Hendrie Project, a qualified applicant for the Second-Hendrie Project, and is a resident of Detroit. White is a principal shareholder and officer of U.H. Construction, is a Black person, a resident and taxpayer

of Detroit, and is an owner of real property in Detroit.

U.H. Construction is the general contractor of the Second-Hendrie Project and general partner of Second Avenue.

The District Court action was brought against three sets of Defendants.

The Federal Defendants are the Secretary of Treasury, the Secretary of Housing and Urban Development, the Director of the Office of Management and Budget, the Department of Housing and Urban Development ("HUD"), and the Federal Housing Administration ("FHA").

The State Defendants are the Governor of the State of Michigan, the Director of the Department of Social Services and Chairman of MSHDA, and the Executive Director of the Michigan State Housing Development

Authority ("MSHDA").

The Private Defendants are Citizens Mortgage Corporation of Delaware (co-mortgagee and servicing agent), Citizens Mortgage Corporation of Michigan (co-mortgagee and servicing agent), Lawyers Title Insurance Corporation (title insurer of mortgage interest), Continental Wingate (housing consultant to MSHDA and the Second-Hendrie Project), Manufacturers Hanover Corporation (parent of Citizens of Michigan and Delaware), Metropolitan Detroit Citizens Development Authority ("MDCDA") (contract relocator of displacees of Second-Hendrie Project), and New Detroit, Inc. (controller of MDCDA).

The HUD, FHA, MSHDA Partnership alleged in the First Amended Complaint.

In 1970 MSHDA and the Governor of Michigan entered into a partnership

with HUD, RHA and the then Secretary of HUD to create a rehab multi-family residential program (including the Second-Hendrie Project) in the City of Detroit known as Project Rehab, and to create employment for blacks and agreed to insure the success of the program.

The Entire Agreement alleged in the First Amended Complaint.

Pursuant to the federal and state partnership and prior to December, 1971, Second Avenue, Hood and U.H. Construction entered into the Entire Agreement with MSHDA, HUD, FHA, Citizens, Lawyers Title, Continental Wingate et al, to finance, insure, rehabilitate, develop and manage the Second-Hendrie Project.

Accepting the allegations of the First Amended Complaint as true, Petitioners personally sustained injuries in fact

Petitioners' First Amended Complaint

charge Respondents with discriminatory practices in the administration of § 236 (Rehab Detroit) Housing Projects, including the Second-Hendrie Project (¶ 46, 49, 60 and 62) and also charge that Respondents violated their statutory duties, exceeded and abused their statutory powers and authority, and breached their contractual commitments, inter alia, in failing: to relocate the displaced tenants of Second-Hendrie Project including Eley (¶ 17, 18, 43, 46, 47, 48, 60 and 81), to rehabilitate the Second-Hendrie Project, to provide employment to Petitioners and other blacks, to insure the success of the Second-Hendrie Project, deprivation of Petitioners' constitutional, contract and civil rights, to prevent imposition of onerous conditions on U.H. Construction making it impossible to complete the

construction (¶ 34, 37, 38 and 39), to grant a mortgage increase to Second Avenue (due to construction cost overruns) while granting mortgage increases to all other rehab projects (¶ 48) [although all the MSHDA financed rehab projects were in default, MSHDA discriminatorily and foreclosed on Second Avenue (¶ 48 and 76)], to honor approved construction draws thereby stopping construction (¶ 34, 35, 39, 40 and 77) and forcing U.H. Construction to use unskilled laborers thereby causing work to be redone and increasing construction costs (¶ 38, 76 and 77), to abide by its agreement regarding the moratorium on mortgage foreclosures (¶ 35, 37, 48 and 76), to cooperate in good faith in the workout agreement and refused to grant a mortgage increase (¶ 34, 38, 39, 40, 44 and 76), to

provide decent housing for the displaced tenants of the Second-Hendrie Project and the Detroit Project Rehab, including Eley (¶ 17, 18, 43, 46, 47, 48, 60 and 81), and to prevent the illegal siphoning off of exorbitant funds for purchase of the sites (including Second-Hendrie) from white absentee landlords.

Second Avenue, U.H. Construction, White and Hood claim in their First Amended Complaint that they have suffered and sustained injuries: (Count I) deprivation of right to participate in the HUD/MSHDA assisted programs and right to carry on business in a free enterprise system (¶ 66(d)), subjection to a foreclosure and receivership action (¶ 69), deprivation of contract rights and economic opportunities and loss of profits, investment, title to real estate and opportunity to pursue

business and subjection to claims from its limited partners (¶ 69), and marked and labeled as undesirable risks and blackmarked in further participation in MSHDA/HUD projects (¶ 69).

Eley and the class members represented by Eley, White, Hood and Second Avenue, claim in their First Amended Complaint that they have suffered and sustained injuries: (Count I), deprivation of safe and sanitary dwellings (¶ 64 and 66), suffered invasion of right of privacy and individual dignity (¶ 64 and 66), deprivation of their constitutional rights of due process and equal protection afforded under the Fifth, Ninth, Thirteenth and Fourteenth Amendments to the United States Constitution (¶ 68 and 69), and as a result of alleged discrimination, loss of social bene-

fits of living in an integrated community and economic damage in social, business and professional activities from living in the Black ghetto (¶1, 64-69).

Second Avenue, U.H. Construction, White, Hood, Eley and the class members they represent claim in their First Amended Complaint that they have suffered and sustained injuries (Count III) as stated in the immediately foregoing paragraph, (Count IV) deprivation of decent housing and equal protection under the laws, deprivation of property and personal rights without due process of law (¶ 99), and deprivation of rights and interest afforded under the rehab program (¶ 104), Count V) damages and economic loss to their professional names, credit, reputations and business (¶ 113) and legal personal

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and property rights afforded under the equal protection and due process clauses, (Count VI) as a result of discrimination, they have suffered embarrassment and economic damage in their business and personal activities from being stigmatized as residents of the Black ghetto (¶ 124), and that the state and county tax burdens have been increased (¶ 126), Count VII) deprivation of equal protection under the laws and due process of law by denial of participation in federally assisted programs, (Count XI) humiliation, nervous shock and embarrassment by reason of the stigma associated with residence in the Black ghetto (¶ 171), (Count XII) destruction of their business and good will (¶ 185), deprivation of right to carry on their business (¶ 185), and loss of real estate, business property and profits

and damage to their reputation and good will.

In 1975, Petitioners brought a private action and a public action against certain federal and state agencies and officials and certain private corporations for alleged violations of the federal and State of [illegible] housing, securities, anti-trust and civil rights laws and Petitioners' civil and constitutional rights afforded under the Fifth, Ninth, Thirteenth and Fourteenth Amendments to the Constitution of the United States, seeking equitable relief and damages.

The First Amended Complaint filed by Petitioners invoked the Court's jurisdiction under 5 U.S.C. 702; 28 U.S.C. 1331(a), 1343(3) and (4), 1361; the Fifth, Ninth, Thirteenth and Fourteenth Amendments and Articles

I and II to the Constitution of the United States and the federal common law. Petitioners sought redress against Respondents for alleged violations and deprivation of rights, privileges or immunities afforded under 15 U.S.C. 1, 42 U.S.C. 1981, 1982, 1983, 1985, 2000d, 3605 and 3612.

Proceedings and Determinations of the District Court

On May 1, 1975, Second Avenue filed its Complaint in the District Court, Civil Action No. 75-70783.

On May 15, 1975, MSHDA filed a number of motions designated as follows: (1) Motion to Dismiss Under Rule 12(b) Fed.R.Civ.P., For Failure to State a Claim Upon Which Relief Can be Granted or for Lack of Subject Matter Jurisdiction; (2) Motion Under Rules 65, 12(b)(1), and 12(b)(6), to Deny Certain Equitable Relief and to

Strike and Dismiss Certain Prayers for Such Relief, or in the Alternative, to Require Adequate Security; (3) Motion, Under Rule 12, to Dismiss for Lack of Standing and Capacity; (4) Motion to Dismiss Because of Statute of Limitations, Laches, Waiver and Estoppel; (5) Motion Under Rule 11; and (6) Motion Pursuant to Rule 65 to Restrain Further Interference or Harassment of Issuance of Bonds. In support of these motions, MSHDA filed affidavits and other extra-pleading materials.

On May 22, 1975, Second Avenue filed its Ex parte Application to Enlarge Time for an Order enlarging the time for the hearing on MSHDA's motions. Also, on May 22, 1975, the District Court entered its Order Limiting Scope of Hearing on Michigan State Housing Development Authority's

Motions.

On May 27, 1975, Second Avenue et al filed with the District Court the original of the First Amended Complaint.

On May 27, 1975, Second Avenue et al filed with the District Court and served on Carla Anderson Hills et al's attorneys a Notice of Amended Complaint, First Amended Complaint, Jury Demand, General Reply to MSHDA's Motions, Brief in Support thereof and Motion to Strike Michigan State Housing Development Authority's Motions and supporting affidavits and papers.

On May 27, 1975, attorneys for Citizens Mortgage Corporation and Manufacturers Hanover Corporation filed their Notice of Appearance and also filed Motions for Dismissal of Certain Allegations and Declaration

of Support for Motions and Brief in support thereof.

During the proceeding before the Honorable Cornelia G. Kennedy on May 27, 1975, the District Court ruled that Second Avenue et al had a right to file a First Amended Complaint notwithstanding the addition of additional plaintiffs.

During the hearing on MSHDA et al's Motions on May 27, 1975, Second Avenue et al's counsel made a motion for leave to file a Second Amended Complaint in the event the Court granted any part or all of the relief sought by MSHDA et al's motions.

Although counsel for Second Avenue et al argued their motion to strike MSHDA's motions and supporting affidavits and papers on May 27, 1975, and requested the relief sought therein, the District Court failed to rule

on said motion and also failed to state any reason why it did not so rule.

On May 28, 1975, the District Court rendered its typewritten 13-page Opinion and Order Granting MSHDA et al's Motions to Dismiss and simultaneously therewith entered its Judgment Dismissing Action. (App. A, infra. pp. 1-46).

The District Court's Grounds for Dismissal of Counts I, II, III, IV, V, VI, VII, IX and X

The District Court, in dismissing Count I of the First Amended Complaint found (a) that the Petitioners, Second Avenue, Hood, Eley, U.H. and White lacked the requisite standing to raise the claims therein; (b) a failure to contain a short and plain statement of Petitioners' various claims showing that they are entitled to relief (App. A, infra. p. 12). MSHDA,

Citizens Mortgage Corporation and Manufacturers Hanover Corporation also argued in their brief on appeal that the District Court dismissed Count I based on its findings of lack of standing and the failure to state cognizable private causes of action.

Also MSHDA, Citizens and Manufacturers Hanover moved to dismiss the First Amended Complaint pursuant to Rule 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. In addition, MSHDA, Citizens and Manufacturers Hanover asserted during the argument on their motion to dismiss that the District Court lacked jurisdiction over the subject matter of the action and that all Counts of the Complaint and First Amended Complaint failed to state claims upon which relief can be granted.

The District Court, in rendering its Opinion Dismissing Action and in entering its Judgment Dismissing Action concluded that it did not have jurisdiction over the subject matter of the action. (App. A, infra, pp. 12-25). However, in addition to, and notwithstanding the District Court's holding of a lack of subject matter jurisdiction, the District Court held that Petitioners Second Avenue, Hood, Eley, U. H. and White's Complaint failed to state claims upon which relief could be granted. (App. A, infra, pp. 16-37).

Proceedings and Determinations of the United States Court of Appeals, Sixth Circuit

On appeal, the Sixth Circuit (per Weick and Peck, Circuit Judges and Cecil, Senior Circuit Judge) affirmed the judgment of the District Court. (App. B, infra, p. 47).

In denying the Petition for Rehearing and Suggestion for Rehearing In Banc, the Sixth Circuit concluded that the petition for rehearing was without merit. (App. C, infra, p. 49).

REASONS FOR GRANTING THE WRIT

I

THIS CASE PRESENTS QUESTIONS OF GREAT IMPORTANCE RELATING TO THE ADMINISTRATION AND ENFORCEMENT OF THE FEDERALLY ASSISTED HOUSING PROGRAMS. ALSO, THE SIXTH CIRCUIT COURT'S DECISION OF AFFIRMANCE OF THE DISTRICT COURT'S JUDGMENT CLEARLY CONFLICTS WITH THE SEVENTH CIRCUIT COURT'S DECISIONS OF GAUTREAUX v. ROMNEY AND CAUTREAUX v. CHICAGO HOUSING AUTHORITY AND THE THIRD CIRCUIT COURT'S DECISION OF SHANNON v. HUD ON THE SAME MATTERS

Here, as was in Mahaley v. Cuyahoga Metropolitan Housing Authority et al, (6th Cir. 1974), this is a civil rights case attacking the growing evil of apartheid in Urban America.

The District Court dismissed the First Amended Complaint for lack of standing. Even a cursory reading of the opinion (App. A, infra, pp. 1-46) demonstrates that standing is not really the problem in this cause.

Commencing on the Supreme Court's decision in Warth v. Seldin, 422 U.S. 490, 95 S.Ct. 2197 (1975), Irving Younger stated in his article titled "In Praise of Simplicity," 62 A.B.A.J. 632 (1976):

> "Read the (District Court) opinion and ask yourself whether standing is really the problem. I think you'll say no, the real problem is that the petitioners raised enormous sensitive issues of race and economic class the court was unwilling to face. It chose to avoid them by adding some very complicated wrinkles to the already vexed law to standing." (App. E, infra, pp.81-82).

Read the District Court's opinion (App. A, infra pp. 10 - 14) and ask yourself whether standing is really the problem in this case. Without

a doubt, the real problem is that Petitioners raised enormous sensitive issues of race and economics that the Court was unwilling to face. Instead, it chose to avoid them by erroneously exercising its discretion to purportedly enhance MSHDA's ability to sell its bonds (App. A, infra, pp. 10-12).

Messrs. Arych Neier and Burt Neuborne appropriately stated in the July/August 1976 Juris Doctor that the current Supreme Court decisions, including Warth v. Seldin, have made a mockery of the notion of direct and uncompelled access to federal courts and unless Congress reasserts its will, the current decisions bid fair to repeal 42 U.S.C. 1983 by judicial fiat. (App. E, infra, pp.68-77).

> Petitioners are entitled to have the District Court decide the merits of the disputes and the particular issues alleged in their

First Amended Complaint -- The principles of Hills v. Gautreaux are fully applicable to the instant case

This case presents a similar and, in many respects, an exact parallel of facts which faced the Supreme Court in Hills v. Gautreaux, _____ U.S. _____, 95 S.Ct. 204 (1975). Here, as in Hills, Petitioners (especially Eley, a former tenant and applicant for federally assisted housing) brought a "public" and "private" action, individually and as members of classes, alleging that Respondents had deliberately selected sites and issued mortgage loan commitments for the construction of housing projects for low or moderate income persons in Black neighborhoods; deliberately determined not to aid or assist in the placement of Black families in white neighborhoods; failed to provide assis-

tance to families under displaced Project Rehab, and deliberately chose Black ghettos for each of the sites of the Project Rehab (Detroit) housing projects to avoid placement of Black families in white neighborhoods in violation of federal statutes and the Fourteenth Amendment. Further MSHDA assisted in these transgressions by providing financial assistance and other support for HUD, MSHDA and FHA's discriminatory housing projects.

Here, as in Hills, jurisdiction was predicated in part upon 28 U.S.C. 1331 (a), the Fifth, Ninth, Thirteenth and Fourteenth Amendments to the Constitution of the United States, Sec. 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. Here, but not as in Hills, jurisdiction was also predicated upon 28 U.S.C. 1331(a), 1343(3) and (4) and the principles of Bivens v. Six Unknown Agents of the

Federal Bureau of Narcotics, 403 U.S. 388, 91 S.Ct. 1999 (1971); Bell v. Hood, 327 U.S. 678, 66 S.Ct. 773 (1946); and Yiamouyiannis v. Chemical Abstracts Service, 521 F.2d 1392 (6th Cir. 1925).

Here, as in Hills, Petitioners sought an injunction against Respondents restraining such racially discriminatory housing practices and requiring Respondents to remedy the past effects of their unconstitutional site selection and tenant-assignment (relocation) procedures by building future federally assisted housing units in predominantly white areas. Here, as in Hills, the District Court granted HUD's motion to dismiss the complaint for lack of jurisdiction and failure to state a claim upon which relief could be granted. Hills v. Gautreaux, supra, at 4482.

In the Hills case, but not in this case, the United States Court of Appeals reversed the order of the district court dismissing the complaint. Gautreaux v. Romney, 448 F.2d 731 (7th Cir. 1971). In Gautreaux v. Romney, at pages 734 and 735, the Court found jurisdiction under 28 U.S.C. 1331 and the Fifth Amendment to be present based on the Supreme Court decision in Bell v. Hood, supra. That Court also found that HUD, through its Secretary, violated the due process clause of the Fifth Amendment (Bolling v. Sharpe, 347 U.S. 497 (1954) and also violated § 601 of the Civil Rights Act of 1964 (Shannon v. HUD, 436 F.2d 809 (3rd Cir. 1975).

A careful study of the Hills case and the prior decisions of the United States Court of Appeals for the Seventh Circuit and the District Court

reported at 503 F.2d 930; 304 F.Supp. 736; 296 F.Supp. 907; 448 F.2d 731; 332 F. Supp. 366, leads us to conclude, as did the Supreme Court and the United States Court of Appeals for the Seventh Circuit, that Petitioners are entitled to have the District Court decide the merits of the disputes and the particular issues alleged in their First Amended Complaint.

The case of Warth v. Seldin, is clearly distinguishable from the instant matter

In affirming the District Court decision, the Sixth Circuit Court cited as additional authority Warth v. Seldin, supra. However, a careful study of the Warth case will reveal that it is not controlling in the instant cause. In the Warth case, the Court found that the petitioners did not assert on behalf of their members any right of action under the

1968 Civil Rights Act, that they personally had not been denied any constitutional rights afforded under 42 U.S.C. 1983, they had not suffered harm nor were one or more of their members injured, that they had not alleged a contract right protected under 1981 or 1982, and they had alleged no monetary injury to themselves or any assignment of damage claims to their members.

Accepting, as the Court must, the various allegations of Petitioners' First Amended Complaint as true (Warth v. Seldin, 422 U.S. at pages 501-522, Conley v. Gibson, 355 U.S. 41 (1957), and Luearel v. McNair, 453 F.2d 836 (6th Cir. 1971)), the complaint and the record on appeal allege and clearly show that Petitioners have personally sustained injury in fact and that their interests sought to

be protected are arguably within the zone of interest to be protected and regulated by the statutes and constitutional guarantees in question.

Eley and the class he represents are clearly the ultimate beneficiaries of the operating subsidies available to the Second-Hendrie Project, as their rents are reduced if the housing is provided and the subsidies are paid. Moreover, each Petitioner has alleged deprivation of statutory and contract rights which only each such petitioner can claim. Therefore, the Petitioners clearly have a "personal stake" in the outcome of the controversies as to assure that concrete adverseness which sharpens the presentation of issues upon which the Court so largely depends for illumination of difficult constitutional questions. Cf. Stanton

v. Stanton, _____ U.S. _____, 95 S.Ct. 1373 (1975).

As recounted above, the allegations of the First Amended Complaint clearly show and demonstrate that petitioners have alleged precisely what Association of Data Processing Service Organizations v. Camp, 397 U.S. 150, 90 S.Ct. 827 (1970) and Malamud v. Sinclair Oil Corporation, 521 F.2d 1142 (6th Cir. 1975) require.

Thus, the Warth case is distinguishable and does not squarely address the questions presented by this case.

II

THE IMPORTANT QUESTIONS WERE WRONGLY DECIDED BELOW

The questions that were squarely presented by the facts of this case are the exact questions that this Court impliedly stated in the Hills case, supra and which the Sixth, Seventh and Third Circuit Courts ex-

pressly stated in Garrett v. City of Hamtramck, 503 F.2d 1236 (6th Cir. 1974); Gautreaux v. Chicago Housing Authority, supra; Gautreaux v. Romney, 452 F.2d 124 (7th Cir. 1972); and Gautreaux v. Romney, supra. Cf. Singleton v. Wulff, _____ U.S. _____, 44 L.W. 5213 (July 1, 1976).

The District Court's finding that none of Petitioners are "aggrieved persons" under Title VIII of the Civil Rights Act of 1968 (App. A, infra, pp.17-24) is clearly erroneous and in conflict with Cincinnati Electronics Corporation v. Kleppe, 509 F.2d 1080 (6th Cir. 1975); Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205 (1972); Association of Data Processing Service Organizations v. Camp, supra; and Singleton v. Wulff, supra, which are fully applicable to this case.

Also, the District Court's findings that Plaintiffs have no standing to raise the claims set forth in Counts I, III, IV, VI and VII (App. A, infra, pp.12-25), that none of the Plaintiffs are "aggrieved persons" under Title VII that none of the statutes cited in paragraph 1(a) of Count I provide a direct private remedy to Plaintiffs (App. A, infra, pp.17-24), that none of the Plaintiffs have standing to raise the claims set forth in Count III (App. A, infra, pp.17-24) are clearly erroneous and in conflict with Singleton v. Wulff, supra; Garrett v. City of Hamtramck, supra; Trafficante v. Metropolitan Life Insurance Co., supra; Association of Data Processing Service Organizations v. Camp, supra; and NAACP v. Alabama, 357 U.S. 449, 78 S.Ct. 1163 (1958) which are fully applicable to this case.

As a ground for its decision, the District Court found that "Plaintiffs cannot rely for standing upon alleged violations of the civil rights of others", purportedly on the authority of Brown v. Board of Trustees, 187 F.2d 20 (5th Cir. 1951) and Bailey v. Patterson, 369 U.S. 31 (1962).

However, a close reading of the Bailey case will reveal that it is inapposite to the facts of this case.

Although it is the general rule that the federal courts should hesitate before resolving a controversy, even one within their constitutional power to resolve, on the basis of the rights of third persons not parties to the litigation, like any general rule, this one should not be applied where its underlying justifications are absent. Singleton v. Wulff, 44 L.W. at pp. 5215-16.

Apposite to the present case is Mr. Justice Blackman's statement that:

> "The other factual element to which the Court has looked is the ability of the third party to assert his own right. Even where the relationship is close, the reasons for requiring persons to assert their own rights will generally still apply. If there is some genuine obstacle to such assertion, however, the third party's absence from court loses its tendency to suggest that his right is not truly at stake, or truly important to him, and the party who is in court becomes by the default the right's best available proponent. Thus, in NAACP v. Alabama, 357 U.S. 449 (1958), the Court held that the NAACP, in resisting a Court order that it divulge the names of its members, could assert the First and Fourteenth Amendments rights of those members to remain anonymous. the Court reasoned that "[t]o require that [the right] be claimed by the members themselves would result in the nullification of the right at the moment of its assertion." Singleton v. Wulff, 44 L.W. at 5216. Also see Eisenstadt v.Baird, 405 U.S. at

446; Barrows v. Jackson, 346 U.S., at 259.

Application of these principles to the present case quietly yields its proper result. Singleton v. Wulff, supra, and Pierce v. Society of Sisters, 268 U.S. 510 (1928).

For the foregoing reasons, it is submitted that it is appropriate in this case to allow the Petitioners to assert the rights of poor Black families as against governmental deprivation of civil, property and constitutional rights.

THE SIX CIRCUIT COURT'S AFFIRMANCE OF THE DISTRICT COURT'S JUDGMENT THAT "PLAINTIFFS' FIRST AMENDED COMPLAINT FAILS . . . TO CONTAIN A SHORT AND PLAIN STATEMENT OF PLAINTIFFS' VARIOUS CLAIMS SHOWING THEY ARE ENTITLED TO RELIEF" CLEARLY CONFLICTS WITH THIS COURT'S DECISIONS OF BELL v. HOOD, CONLEY v. GIBSON, AND HOSPITAL BUILDING CO. v. REX HOSPITAL AND FAR DEPARTED FROM THE ACCEPTED

AND USUAL COURSE OF PLEADING AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION

The District Court's determination that the Court lacked jurisdiction and that the Complaint failed to state causes of action is fatally incompatible

A careful study of the opinion amply demonstrates that the District Court dismissed the First Amended Complaint based on a determination that it lacked jurisdiction and that the First Amended Complaint failed to state causes of action. (App. A, infra, pp. 1-46).

In its opinion and order granting Respondents' motion to dismiss, the District Court found that none of the statutes set forth in paragraph 1(a) of Count I of the First Amended Complaint provide a direct and private remedy to Petitioners. Also, the District Court found that Petitioners

did not allege that they were in any way affected and harmed by the conduct of Respondents (App. A, infra, pp. 12-19). These rulings were holdings that there was a lack of jurisdiction to bring Count I. Gautreaux v. Romney, supra, at 733 as cited in the Hills case, supra, at 4482. Cf. Wright, Miller and Cooper, Federal Practice & Procedure: Jurisdiction, ¶ 3531, pp. 185-186, 191, 197 and 205. Also, see Warth v Seldin, supra, at 498-501.

Since the Court must assume jurisdiction to decide whether the allegations state a cause of action, the District Judge's determination that the Court lacked jurisdiction and that the Complaint failed to state causes of action is incompatible. Brown v. Strickler, 422 F.2d 1000 (6th Cir. 1970) and Bell v. Hood, supra.

The District Court's finding that "Plaintiffs' first amended complaint fails . . . to contain a short and plain statement of Plaintiffs' various claims showing that they are entitled to relief" is clearly erroneous and in conflict with Tipler v. E.I. duPont deNemours and Co., 443 F.2d 125 (6th Cir. 1971) and Azar v. Conley, 456 F.2d 1382 (6th Cir. 1972), which are fully applicable to this case.

Also, the District Court's inclusion in the record of affidavits and documents submitted by both parties (exhibits and affidavits of MSHDA and affidavits and exhibits of Petitioners (see reference App. A, infra, pp. 4-12) converted Respondents' Rule 12(b) motions to dismiss to Rule 56 motions for summary judgment, and the District Court's failure to grant Petitioners' Application to Enlarge Time for Hearing

on MSHDA's motions and to afford Petitioners the opportunity to file counter affidavits and take discovery is clearly erroneous and in conflict with the Supreme Court's affirmance of Gautreaux v. Chicago Housing Authority, 503 F.2d 930 (7th Cir. 1974); Gautreaux v. Romney, 452 F.2d 124 (7th Cir. 1972); Gautreaux v. Romney, 448 F.2d 731 (7th Cir. 1971) and the Supreme Court's statements in Warth v. Seldin, supra, at 501-502 and 526-527 per Brennan, White and Marshal jj, dissenting, which are fully applicable to this case.

The lower court's treatment of the injury in fact requirements directly conflicts with Malamud v. Sinclair Oil Corporation, supra; Trafficante v. Metropolitan Life Insurance Co., supra; Association of Data Processing Service Organizations v. Camp, supra, and Singleton v. Wulff, supra. Hence, any

prudential, nonconstitutional considerations that underlay the Court's disposition of the injury in fact standing requirement in cases such as Warth v. Seldin, are simply inapposite when review is sought under a congressionally enacted statute conferring standing and providing for judicial review. Simon v. Eastern Kentucky Welfare Rights Organization, ____ U.S. ____, 44 L.W. 4724, 4734 (1976), Brennan J., dissenting).

Mr. Justice Brennan in his dissenting opinion made an appropriate comment in Simon v. Eastern Kentucky Welfare Rights Organization, supra, 44 L.W. 4736:

> "The Court's treatment of injury in fact without any 'particularization' in light of either the policies properly implicated or our relevant precedents threatens that it shall 'become a catchall for an unarticulated discretion on the part of

this Court' to insist that the federal courts 'decline to adjudicate' claims that it prefers they not hear. Poe v. Ullman, 367 U.S., at 530 (Harlan, J., dissenting)."

IN HOLDING THAT THE GOVERNMENTAL AGENCIES AND OFFICERS DO NOT FALL WITHIN THE PURVIEW OF THE ANTI-TRUST LAWS, ON THE AUTHORITY OF PARKER v. BROWN, ERRONEOUSLY OR WITHOUT CONSIDERING THE VALIDITY OF THE CLAIMS AGAINST THE PRIVATE RESPONDENTS, THE LOWER COURTS RENDERED DECISIONS IN CONFLICT WITH THE DECISIONS OF THIS COURT ON THE QUESTION OF GOVERNMENTAL IMMUNITY

In support of its decision, the District Court held that:

> "It is well settled that governmental agencies and officers do not fall within the purview of the anti-trust laws, Parker v. Brown, 317 U.C. 341 (1943); Alabama Power Co. v. Alabama Electric Cooperative, Inc., 394 F.2d 672 (5th Cir. 1968). This immunity is not removed by charging a conspiracy between governmental and private parties. Saenz v. University Interscholastic League, 487 F.2d 1026 (5th Cir. 1973). Although there are five private party-defendants listed in the caption of this action, there are no allegations of any acts by any of the private individuals which are in restraint of trade." (App. A, infra, pp. 34-37).

The very language of Count XII of the First Amended Complaint reveals that the District Court's finding that there are no allegations of any acts by any private individuals which are in restraint of trade is clearly erroneous. (Paragraphs 177 through 182 of the First Amended Complaint).

Moreover, the cases cited by the District Court in support of its Opinion are not applicable by reason of the waiver of sovereign immunity under 12 U.S.C. §1702, 42 U.S.C. 3939, and the recent Supreme Court decision of Goldfarb v. Virginia State Bar, 421 U.S. 773, 95 S.Ct. 204, 215 (1975).

In Cantor v. The Detroit Edison Company, _____ U.S. _____, 44 L.W. 5357 (July 6, 1976), the District Court

entered a summary judgment against petitioner, holding on the authority of Parker v. Brown, supra, that the Michigan Public Service Commission's approval of the respondent's light-bulb marketing practices exempted the practices from the federal anti-trust laws, and the Court of Appeals, Sixth Circuit, affirmed. 513 F.2d 630 (6th Cir. 1975). Mr. Justice Stevens, in delivering the opinion of the Court in Cantor stated that neither Michigan's approval of respondent's present tariff nor the fact that the light-bulb exchange program may not be terminated until a new tariff is filed, is sufficient basis for implying an exemption from the federal anti-trust laws for that program. Mr. Justice Stevens further stated that the State of Michigan's participation in the decision to have a light-bulb exchange

program is not so dominant that it is unfair to hold a private party responsible for its conduct in implementing the decision, but rather the respondent's participation in the decision is sufficiently significant to require that its conduct, like comparable conduct by unregulated businesses, conform to applicable federal law.

In the recent case of Hospital Building Company,y v. Trustees of the Rex Hospital, _____ U.S. _____, 44 L.W. 4683 (May 24, 1976), petitioner brought a suit under § 1 and 2 of the Sherman Act alleging that respondents were engaged in an unlawful conspiracy to restrain trade and commerce in the furnishing of medical and surgical hospital services, and that they were attempting to monopolize the hospital business in the Raleigh, N.C., Metropolitan area. The District

Court dismissed petitioner's amended complaint on the pleadings. The Court of Appeals for the Fourth Circuit, sitting en banc, affirmed the judgment of the District Court. The Supreme Court granted certiorari and reversed the lower courts, and held that the amended complaint when fairly read, adequately alleged a restraint of trade substantially affecting interstate commerce and that the dismissal on the pleadings of petitioner's amended complaint was therefore inappropriate. Mr. Justice Marshal in delivering the opinion of the Court stated that:

> "We have held that 'a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claims which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1967) (footnote

> omitted). And in anti-trust cases where 'the proof is largely in the hands of the alleged conspirators', Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473 (1962), dismissals prior to giving the plaintiffs ample opportunity for discovery should be granted very sparingly. Applying this concededly rigorous standard, we conclude that the instant case is not one in which dismissal should have been granted. Petitioner's complaint states a claim upon which relief can be granted under the Sherman Act. (footnote omitted). Accordingly, the judgment of the Court of Appeals is reversed and the case is remanded for further proceedings consistent with this opinion." Hospital Building Co., v. Trustees of Rex Hospital, (supra), 44 L.W. at 4685.

In United States v. Nat'l Assn of Securities Dealers, the Court pointed out:

> "Implied anti-trust immunity is not favored, and can be justified only by a convincing showing of clear repugnancy between the anti-trust laws and the regulatory system. See e.g. United States v.

Borden Co., 308 U.S. 188, 197-206 (1939)." 422 U.S. 694, 720.

Furthermore, the Court in Cantor v. The Detroit Edison Company stated:

> "In the Court's most recent consideration of this subject, it described the defendant's claim with pointed precision as 'this so-called state action exemption.' Goldfarb v. Virginia State Bar, 421 U.S. 773, 778. The Court then explained that the question whether the anti-competitive activity had been required by the state's acting as sovereign was the 'threshold inquiry' in determining whether it was state action of the type the Sherman Act was not meant to prescribe. Certainly that careful use of language could not have been read as a guarantee that compliance with any state requirement would automatically confer federal anti-trust immunity.
>
> ***
>
> It surely does not qualify the categorical statement in Parker that 'a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it or by declaring that their action is lawful. 317 U.S. at 351.
>
> ***

> Although it is tempting to try to fashion a rule which would govern the decision of the liability issue and the damage issue in all future cases presenting state action issues, we believe that the court should adhere to its settled policy of giving concrete meaning to the general language of the Sherman Act by a process of case-by-case adjudication of specific controversies.
>
> Since the District Court has not yet addressed the question ofwhether the complaint allege a violation of the anti-trust laws, the case is remanded for a determination of that question and for such other proceedings as may be appropriate." 44 L.W. at 5363-5364.

It is well settled that the judicially created exemption of immunity for state approved transactions may not be invoked when governmental agents or instrumentalities of governments act outside their scope of authority. Union Carbide and Carbon v. Nisley, 300 F.2d 561, 576-77 (10th Cir. 1961) cert. dism'd sub nom. Wade v. Union Carbide and Carbon Corp., 371 U.S. 801 (1962);

nor may state officials claim anti-trust immunity for acts which exceed the authority vested them by law, Alabama Power Company v. Alabama Elec. Coop, 394 F.2d 672, 675 (5th Cir. 1968) cert. denied 393 U.S. 100 (1968).

There is no authority, statutory or otherwise, authorizing state officials to conspire with persons to restrain commerce or exempting them from suit if they so conspire. Bankers Life & Casualty Co. v. Larson, 257 F.2d 377 (5th Cir. 19___), cert. denied 358 U.S. 879 (1958). Furthermore, a proprietary or business function of the state, as contrasted with a governmental function, is divested from a state's sovereignty. Opinion of the Attorney General of Georgia, 1948-1949 Trade Cases, ¶ 62, 455 (June 14, 1949). Also see 16L Business Organizations, §102.01 at page 102-4; Continental

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Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962); United States v. Sisal Sales Corp., 274 U.S. 268 (1927) (foreign officials); Harman v. Valley National Bank, 399 F.2d 564 (9th Cir., 1964); and Independent Taxicab Operators' Ass'n v. Yellow Cab Co., 278 F. Supp. 979, 983 (N.D. Cal. 1968).

Count XII of Petitioners' First Amended Complaint specifically alleges that the Respondents have exceeded their authority (¶ 177), conspired to control § 236 Rehab (Detroit) Housing Projects and Developments, and that the Respondents, including MSHDA and five (5) private corporations, are engaged in the rehabilitation, construction and financing of low to moderate income housing or developments of a proprietary or business nature, in competitive areas of the economy, (¶ 178 and 182), Advisory Opinion re Consti-

tutionality, P.A. 1966, No. 346, 380 Mich. 554 (1968) at page 585, in violation of the anti-trust laws.

Here, as in Cantor v. The Detroit Edison Company, since the lower courts erroneously or did not consider the validity of the claims against the private corporations and erroneously determined that the governmental agencies and officers were immune from the anti-trust laws, it is clear that Count XII alleges acts sufficient to assert a claim upon which relief can be granted and that the Respondents are not immune or exempt in any respect under the anti-trust laws.

THIS PETITION RAISES SUBSTANTIAL AND IMPORTANT QUESTIONS CONCERNING THE STANDARDS APPLICABLE TO TESTING THE SUFFICIENCY OF A COMPLAINT FOR SUBJECT MATTER JURISDICTION UNDER THE FEDERAL RULES OF CIVIL PROCEDURE

This Petition raises substantial

and important questions concerning pleadings practice in the federal courts. The Petition for Writ of Certiorari should be granted to settle the present conflict in the law concerning the pleading requirements sufficient to survive a motion to dismiss for lack of standing and the apparent conflict in this Court's decisions between Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Hospital Building Co. v. Trustees of the Rex Hospital, _____ U.S. _____, 44 L.W. 4683 (May 24, 1976); Warth v. Seldin, 422 U.S. 490, _____ S.Ct. 2197, _____ (1975), and Simon v. Eastern Kentucky Welfare Rights Org., _____ U.S. _____, 44 L.W. 5213 (July 1, 1976).

Respondents' motion to dismiss asserted that the District Court had no jurisdiction over the subject matter of the Amended Complaint, Fed.R.Civ.P.

12(b)(1), and that the Amended Complaint failed to state a claim upon which relief could be granted, Fed.R.Civ.P. 12(b)(6). Petition for Writ, pp. supra. The District Court granted the motion to dismiss, concluding that Petitioners lacked standing to bring the suit, that the Complaint failed to state claims upon which relief could be granted, on the ground, inter alia, that: "The First Amended Complaint fails . . . to contain a short and plain statement of Plaintiffs' various claims showing that they are entitled to relief."

For purposes of testing the sufficiency of a complaint, the Court must accept its allegations as being true. Gardner v. Toilet Goods Ass'n., 387 U.S. 167 (1967).

Up until 1975, it was settled law

in the federal courts that:

> "A complaint should not be dismissed for failure to state a claim upon which relief can be granted, unless it is certain that the plaintiff can prove no state of facts in support of its allegations that would entitled plaintiff to relief. Conley v. Gibson, 355 U.S. 41 (1957)."

Also, it is well settled law of the federal courts that an action brought under the civil rights statutes requires the reviewing court to scrutinize any such dismissal of a complaint with special care, Azar v. Conley, 456 F.2d 1382, 1384 (6th Cir. 1972), and that the reviewing court, following dismissal of a complaint, has a duty to review the allegations of the complaint in the light most favorable to the plaintiffs. Conley v. Gibson, supra; Luearel v. McNair, 453 F.2d 836 (6th Cir. 1971); and L'Orange v. Medical Protective Company, 394 F.2d 57 (6th

Cir. 1968).

The conflict of the Supreme Court decisions concerning the standards applicable to testing the sufficiency of a complaint for subject matter jurisdiction is demonstrated by Mr. Justice Brennan's dissent, with whom Mr. Justice White and Mr. Justice Marshal joined, in Warth v. Seldin, supra, as follows:

> "The Court today, in an opinion that purports to be a "standing" opinion but that actually, I believe, has overtones of outmoded notions of pleading and of justiciability, refuses to find that any of the variously situated plaintiffs can clear numerous hurdles, some constructed here for the first time, necessary to establish "standing". While the Court gives lip-service to the principle, oft-repeated in recent years, that 'standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal', ante, at 2206, in fact the opinion, which tosses out of court almost every

> conceivable kind of plaintiff who could be injured by the activity claimed to be unconstitutional, can be explained only by an indefensible hostility to the claim on the merits. I can appreciate the Court's reluctance to adjudicate the complex and difficult legal questions involved in determining the constitutionality of practices which assertedly limit residence in a particular municipality to those who are white and relatively well-off, and I also understand that the merits of this case could involve grave sociological and political ramifications. But courts cannot refuse to hear a case on the merits merely because they would prefer not to and it is quite clear, when the record is viewed with dispassion, that at least three of the groups of plaintiffs have made allegations, and supported them with affidavits and documentary evidence, sufficient to survive a motion to dismiss for lack of standing. (footnotes omitted).
>
> ***
>
> To require them to allege such facts is to require them to prove their case on paper in order to get into court at all, reverting to the form of fact-pleading long abjured in

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> the federal courts. This Court has not required such unachievable specificity in standing cases in the past, see Scrap, supra, and Jenkins, supra and the fact that it does so now can only be explained by an indefensible determination by the Court to close the doors of the federal courts to claims of this kind." 95 S.Ct. 2216 and 2220.

Furthermore, the comment of Mr. Justice Brennan, with whom Mr. Justice Marshal joined, concurring in the judgment and dissenting in Simon v. Eastern Kentucky Welfare Rights Organization, 44 L.W. 4733, at n. 6, is apposite to this issue:

> "One waits in vain for an explanation for this selectivity imposed pleading requirement; a requirement so at odds with our usual view that under the Federal Rules of Civil Procedure 'a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim, which would entitle him to relief'. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). The want of an explanation is even more striking

> when considered in light of our reaffirmation of Conley only this Term, Hospital Building Co. v. Trustees of the Rex Hospital, ____ U.S. ____, ____ (1976), and our observation therein that the same standard is applicable to testing the sufficiency of the complaint for subject matter jurisdiction."

In the instant case, when the First Amended Complaint is viewed with dispassion, it is quite clear that all Petitioners have made allegations sufficient to survive a motion to dismiss for lack of standing. Therefore, in order to prevent such a patently incongruous state of the law in an area as vital as the standard applicable to testing the sufficiency of a complaint for subject matter jurisdiction, Petitioners urge this Court to grant the Petition for Writ of Certiorari so that the conflict in this Court's decisions may be settled.

EXCEPTIONAL GROUNDS FOR WRIT

The decisions of the United States

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Supreme Court are binding upon federal courts on appeal until such time as the Supreme Court informs the federal courts that they are not. Jordan v. Gilligan, 500 F.2d 701 (6th Cir. 1974). Also see 1B Moore's Federal Practice, ¶ 0.402 generally.

Although we find no case in point in the Sixth Circuit Court of Appeals, it is well established that one panel of a Court of Appeals may not disregard a precedent set by a prior panel, even though it conceives error in the precedent. Absent an overriding Supreme Court decision or a change in the statutory law, only the court in banc can do so. Cf. Davis v. Estelle, 529 F.2d 437 (5th Cir. 1976); United States v. Hawes, 529 F.2d 742 (5th Cir. 1976), and United States v. Olivares-Vega, 495 F.2d 827 (2nd Cir. 1974). Also cf. Hudgens v. N.L.R.B., _____ U.S. _____, 96 S.Ct. 1029 (1976).

(App. A, infra, pp.10-14). To do so constitutes an encroachment upon the functions of the legislative body, as recognized through the time-honored principle of the separation of powers of the three branches of our federal governments.

Accordingly, as appears on the face of the District Court's Opinion and Judgment (App. A, infra, pp.1-46), the dismissal of Petitioners' First Amended Complaint by the Courts below constituted clear error and an abuse of discretion. Not only were the lower courts' judgments erroneous, but they were also counterproductive in the sensitive and controversial circumstances of the case before this Court.

We pray, that this Court will not be diverted from its appointed task of making "a living truth" of our constitutional ideal of equal justice under

The decisions of the lower courts herein conflict with the decisions of the United States Court of Appeals for the Third, Sixth and Seventh Circuits, supra, and the Supreme Court, supra, therefore consideration by this Court of this case is necessary to secure and maintain uniformity with the aforesaid decisions.

The Supreme Court in Griswold v. Connecticut, 381 U.S. 479 at 482 (1965), Mr. Justice Douglas, speaking for the Court, said:

> "We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions."

It is clear that the federal courts do not have jurisdiction and power to determine the wisdom, need and propriety of actions that touch economic problems, business affairs or social conditions, as did the trial court in rendering its Opinion and Judgment

law. Cf. Cooper v. Aaron, 358 U.S. 1, 20 (1958).

CONCLUSION

For the foregoing reasons, Petitioners respectfully urge that:

A. Their Writ of Certiorari be granted to review the judgment of the United States Court of Appeals for the Sixth Circuit; and

B. Upon consideration by this Honorable Court, the Judgments of the United States Court of Appeals for the Sixth Circuit and the District Court be reversed.

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PROFESSIONAL CORPORATION

BY: /s/ Frederick A. Patmon
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BY: /s/ Stanley R. Kirk
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Dated: August 18, 1976

Supreme Court, U. S.
FILED
NOV 12 1976
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-670

SECOND AVENUE LIMITED DIVIDEND HOUSING ASSOCIATION, et al,

PETITIONERS,

v.

CARLA ANDERSON HILLS, Secretary Department of Housing and Urban Development, et al,

RESPONDENTS.

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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"'The Current Supreme Court has made a mockery of the notion of direct and uncomplicated access to federal courts,' say Arych Neier and Burt Newborne," July/August, 1976, Juris Doctor p. 34 68

"In Praise of Simplicity,"
Irving Younger, A.B.A.J.,
May, 1976, p. 632

APPENDIX A

Judgment Dismissing Action
[Filed May 28, 1975]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SECOND AVENUE LIMITED DIVIDEND HOUSING ASSOCIATION, a Limited Partnership,

Plaintiff,

v.

CARLA ANDERSON HILLS, Secretary of Housing and Urban Development of the United States; JAMES T. LYNN, Director, Office of Management and Budget of the United States; WILLIAM G. MILLIKEN, Governor of the State of Michigan; JOHN DEMPSEY, Chairman, Michigan State Housing Development Authority; FRANK J. KELLEY, Attorney General of the State of Michigan; DAVID L. FROH, Executive Director, Michigan State Housing Development Authority; CITIZENS MORTGAGE CORPORATION, a Michigan corporation; CITIZENS MORTGAGE CORPORATION, a Delaware corporation; MICHIGAN STATE HOUSING DEVELOPMENT AUTHORITY, a public body corporate and politic of the State of Michigan; NEW DETROIT , INC., a Michigan nonprofit corporation; METROPOLITAN DETROIT CITIZENS DEVELOPMENT AUTHORITY, a Michigan nonprofit corporation; MANUFACTURERS HANOVER CORPORATION, a Delaware corporation;

LAWYERS TITLE INSURANCE CORPORATION, a Virginia corporation; CONTINENTAL WINGATE COMPANY, INCORPORATED, a Delaware corporation; THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, a Department of the Executive Branch of the United States; FEDERAL HOUSING ADMINISTRATION, an agency of the Department of Housing and Urban Development; WILLIAM E. SIMON, Secretary of Treasury of the United States, and DOES 1 through 25, Inclusive, jointly and severally,

Defendants.

JUDGMENT DISMISSING ACTION

For the reasons stated in the Court's Opinion and Order entered and filed this date, defendants Motion to Dismiss is GRANTED and Counts I, III, V, VI, VII, VIII, IX, X, XI, and XII are DISMISSED WITH PREJUDICE. Counts II, XIII, and XIV are DISMISSED WITHOUT PREJUDICE, and Count IV is DISMISSED WITH PREJUDICE insofar as it attempts to state a claim under the Civil Rights Act of 1867 and DISMISSED

WITHOUT PREJUDICE as to the allegation of a third-party beneficiary contract.

/s/ Cornelia G. Kennedy
Cornelia G. Kennedy

United States District Judge

Dated: May 28, 1975
Detroit, Michigan

A True Copy

HENRY R. HANSSEN,
Clerk

By /s/ _____
Deputy Clerk

OPINION AND ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

[Filed May 28, 1975]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[Title Omitted in Printing]

OPINION AND ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

The plaintiffs in the instant action seek wide-ranging declaratory and injunctive relief, as well as money damages, alleging multiple and widespread violations by defendants of plaintiffs' rights under the Fifth, Ninth, Thirteenth and Fourteenth Amendments and Articles I and II of the Constitution of the United States, various national housing acts and community or metropolitan development acts, §§ 1980, 1981, 1982, 1983, 1985, and 1988 of Title 42, United States Code; Title 7 of the 1964 Civil Rights Act, and numerous other statutes.

Defendants MICHIGAN STATE HOUSING DEVELOPMENT AUTHORITY (MSHDA) and CITIZENS filed a motion to dismiss the complaint and in the alternative for summary Judgment. Plaintiffs requestd

discovery before any determination was made on the request for summary judgment. The Court directed that initial consideration be given only to the motion to dismiss. Hearing was noticed for Tuesday, May 27, 1975. On that date plaintiffs filed the first amended complaint. Defendants MSHDA and CITIZENS urge that the grounds stated in their motion to dismiss apply equally to the allegations of the first amended complaint.

Plaintiffs are entitled as a matter of right to file an amended complaint in this action and the Court has granted leave to add the additional parties-plaintiff if such leave is required (only plaintiff SECOND AVENUE LIMITED DIVIDEND HOUSING ASSOCIATION was named as plaintiff in the original

complaint). The grounds stated in the motion to dismiss are considered as directed against well-pleaded allegations of the first amended complaint.

Plaintiff SECOND AVENUE LIMITED DIVIDEND HOUSING ASSOCIATION (SECOND AVENUE) alleges that it is a limited partnership, owned, controlled, and managed by black persons and that it was organized for the purpose of acquiring, rehabilitating, and developing certain apartment houses on Second Avenue and Hendrie Street in the City of Detroit, to provide housing facilities to persons of low and moderate income and that financing of this project was to be accomplished with the assistance of a mortgage commitment loan from MSHDA and a loan from defendant CITIZENS MORTGAGE CORPORATION

(a Michigan corporation) secured by a mortgage on the property and insured by the DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT (HUD) under § 236 of the National Housing Act. It further alleges that it received such mortgage commitment loan and mortgage and further that the defendants, CITIZENS-Michigan and MSHDA, are foreclosing the mortgage in an action pending in the Wayne County Circuit Court, State of Michigan.

Plaintiffs allege that plaintiff NICHOLAS HOOD is a general partner of SECOND AVENUE, that he is a state and federal taxpayer, that he is a black person, and that he brings this action "derivatively in the right and for the benefit of SECOND AVENUE."

Plaintiffs allege that plaintiff

FRED L. ELEY is a black person who resided in one of the apartments being rehabilitated by SECOND AVENUE and "was relocated from one of the buildings of the SECOND-Hendrie Project, and since that time has been on a preference waiting list to relocate back to the Second-Hendrie Project, if and when same is completed." The first amended complaint further alleges that MR. ELEY received his primary income "from Social Security Programs of Federal public assistance programs." The first amended complaint further alleges that Mr. ELEY brings this action on behalf of ". . . all prospective qualified tenants or applicants similarly situated under HUD's Project Rehab Program or any other present or future federally or state assisted low or moderate income

housing projects or housing developments in the City of Detroit, Michigan." The first amended complaint further alleges that the members of the class on whose behalf plaintiff ELEY sues "desire to enjoy and enforce their right to a decent, safe, sanitary and suitable living environment and housing in the City of Detroit; their right to live near their present jobs; their right to have their children continue their education in the City of Detroit school system."

The first amended complaint further alleges that plaintiff U. H. CONSTRUCTION COMPANY, INC. (U.H.) is a corporation which acted as general contractor for SECOND AVENUE's project and that it devoted considerable sums of money and time in developing said

project and that it has paid state and federal taxes.

The first amended complaint further alleges that plaintiff CLARENCE C. WHITE was the principal shareholder and president of U.H.; that he is a black person and citizen of the State of Michigan, and files federal and state income tax returns; and that he brings this action individually and as a representative "of all persons interested in or affected by the issuance of the public securities by Defendant MSHDA."

The first amended complaint alleges that the defendant MSHDA is a public body corporate and politic of the State of Michigan, and that public low or moderate income housing facilities and programs in the State of Michigan are

under the jurisdiction, administration, management and control of MSHDA.

The first amended complaint alleges in ¶ 4(e) that MSHDA receives its funds through

> federally aided mortgage subsidy payments or federal tax benefits insurance under existing HUD, FHA or VA mortgage assistance or insurance programs or activities under § 203, 221(d)(2), 235 or 236 of the National Housing Act, § 101 of the Housing and Urban Development Act of 1965 and § 501 of the Serviceman's Readjustment Act of 1944. Also, MSHDA receives financial assistance or subsidy from the United States and the State of Michigan or any of its political subdivisions or otherwise through federal, state, county and city tax exclusions or benefits or exemptions pursuant to the Internal Revenue Code of 1954 as amended and the state, county and city tax laws.

The identities of most of the other defendants are described in the title of the first amended complaint and will not be repeated here.

Plaintiffs' first amended complaint fails, as did SECOND AVENUE's original complaint, to contain a short and plain statement of plaintiffs' various claims showing that they are entitled to relief. However, since defendants assert that a prompt resolution of certain issues is critical to MSHDA's ability to sell its Bonds and the allegations can, with careful attention, be sorted and the possible claims plaintiffs are asserting can be analysed, particularly with the aid of the authorities upon which plaintiffs rely in their brief, the Court will pass on the merits of the motion to dismiss.

Count I of the first amended complaint challenges MSHDA's entire program on the grounds, among others, that it is racially discriminatory as

applied in that its effect and purpose is to keep black residents in the black neighborhoods in the central part of the City of Detroit, and prevent them from moving to white neighborhoods. No plaintiff in this action has standing to raise this challenge. Plaintiffs SECOND AVENUE and U.H. are business entities. Plaintiff HOOD sues only in his representative capacity. Plaintiff WHITE does not allege that he as an individual is being denied the right to live outside the central city. The same is true of plaintiff ELEY, who indeed alleges that he wishes to remain in the central city and specifically in the Second-Hendrie project. It is well settled that plaintiffs cannot rely for standing upon alleged violations of the civil rights of others. Brown v. Board of Trustees, 187 F.2d

20 (5th Cir. 1951). Only persons actually deprived of their civil rights can sue to redress such rights. Bailey v. Patterson, 369 U. S. 31 (1962).

The courts depart from the general rule only in unique situations. For example, where fundamental rights would otherwise be denied and the possessor of the right would have no adequate remedy, Truax v. Raich, 239 U. S. 33 (1915), or where "it would be difficult if not impossible for the persons whose rights are asserted to present their grievances before any court." Barrows v. Jackson, 346 U. S. 249, 257 (1953).

The other allegations of Count I which allege that defendants are engaged in a variety of practices designed to produce and in fact resulting in discrimination in

housing on the basis of race, are all subject to the same infirmity.

None of the plaintiffs allege any facts which would constitute discrimination against them on the basis of race, even if a limited partnership can be viewed as having a racial character.

Count I also alleges various misrepresentations by MSHDA and HUD as to what their programs would encompass and what they would accomplish. Plaintiffs fail, however, to allege in what way they have been harmed thereby. Further, plaintiffs allege that only a small portion of MSHDA's funds have benefited black sponsors. However, since plaintiffs are among the black sponsors so benefited, they likewise lack standing to complain in this regard.

Plaintiffs also allege in Count I that SECOND AVENUE and U.H. were required by their agreement with the MSHDA and HUD to use members of the Allied Trade Union (Local No. 124) in rehabilitating the three buildings but fail to state in what way this violated plaintiff's rights.

Numerous allegations are made in Count I with respect to the failure of defendant METROPOLITAN DETROIT CITIZENS DEVELOPMENT AUTHORITY (MDCDA), a Michigan non-profit corporation created under the auspices of NEW DETROIT, INC., to fulfill its obligations under the MSHDA-HUD program to render referral assistance to families required to relocate during rehabilitation. How However, the first amended complaint is silent as to whether Mr. ELEY required such assistance or was denied

Procedure Act. See Mattingly v. Elias, 325 F. Supp. 1374 (E.D. Pa. 1971).

Count I also alleges violation Titles 7 and 8 of the Civil Rights Act of 1968. It is clear, however, that none of the plaintiffs are aggrieved persons under Title 8 and further that the procedures required under that title have not been followd by any of the plaintiffs. Further, Title 8 prohibits discrimination in the terms or conditions under which housing is rented or sold. There is no specific allegation of any such discrimination as to any rental unit alleged here. Nor, are plaintiffs entitled to any relief under Title 7. First, there is no allegation that plaintiffs are employed by defendants or sought employment with them, and, second, the MSHDA,

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such assistance.

Further allegations in Count I allege violations by defendants of various national and state housing acts. See ¶ 1(a) of Count I for a complete list of these statutes. None of these statutes provide a direct, private remedy to plaintiffs. Courts have been very reluctant to imply a private cause of action, particularly against governmental agencies, for alleged violations of duties imposed by the Housing Acts. See United States v. Neustadt, 366 U.S. 696 (1961); Jackson v. Romney, 355 F.Supp. 737 (D.D.C. 1973). Plaintiffs here do not have the standing of the plaintiff in Apter v. Richardson, 510 F.2d 351 (7th Cir. 1975), where plaintiff's standing existed under the Administrative

as an agency of the state, and the other defendants who are appointees of the state or elected officials, are exempt under 2000 e(b)(1).

Count II of the first amended complaint seeks injunctive relief to prevent the foreclosure of the mortgages on SECOND AVENUE's property for the same reasons stated in Count I of the first amended complaint and for the further reason that it is alleged certain defendants agreed to forbear to exercise the right to foreclose. To the extent that plaintiffs allege an agreement to forbear, that claim is here only on a pendant jurisdiction basis. This Count seeks to enjoin the state foreclosure proceedings without any showing that the claims raised here cannot be fully litigated in the pending

state action. Absent that showing, this Court should not enjoin the state court proceedings.

Count III, more specifically, alleges a violation of 42 United States Code, 2000d which is Title 6, § 601 of the Civil Rights Act of 1964. Once again, none of the plaintiffs here are persons who themselves are alleged to suffer injury under that section and, therefore, lack standing.

Count IV directs its allegations more specifically to the Civil Rights Act of 1867, 42 U.S.C. 1981, et seq. Certain of the defendants, such as MSHDA, are not liable under 1983, since they are not persons. However, there are defendants who are individuals and who are not exempt from these statutes. Plaintiff SECOND

AVENUE as a limited partnership, has no racial identity and cannot be discriminated against on the basis of race. Plaintiff NICHOLAS HOOD sues only in a representative capacity on behalf of the partnership (see ¶ 1(e) of Count I). Plaintiff CLARENCE WHITE, although he sues individually, alleges no discrimination against himself as an individual. U.H. is a corporation and, likewise, cannot be discriminated against on the basis of race. Plaintiff ELEY fails to allege any discrimination against himself on the basis of race or any cognizable civil rights.

Count IV also alleges a third party beneficiary contract under M.S.A., § 27A.1405. Any claim under that section can only be brought in this Court on a pendant jurisdiction basis.

Count V alleges in detail the relocation assistance requirements developed by HUD. It alleges that defendants, NEW DETROIT, INC. and MDCDA, contracted to carry out the said program and have failed to do so. However, the first amended complaint is totally silent as to any plaintiff who has been in any way adversely affected thereby. Although it is alleged that Mr. ELEY previously resided in the Second-Hendrie property, there is no allegation, as the Court stated previously in its discussion of Count I, that Mr. ELEY required such assistance, was denied such assistance, or suffered any injury of any kind. In view of the total lack of such allegations Mr. ELEY cannot represent the class described in Count V. Further, since

one remedy sought by the other plaintiffs, the termination of the entire program of rehabilitation of buildings in the central city, is contrary to the interest of the class MR. ELEY is alleged to represent, that class cannot properly be represented in this action.

In Counts VI and VII, plaintiffs seek injunctive relief to prohibit defendant WILLIAM E. SIMON, Secretary of the United States Treasury, from granting tax exempt status, tax exclusions and deductions and conferring other tax benefits to defendant MSHDA. Plaintiffs assert that the granting of these tax benefits constitute federal assistance for racially segregatory purposes in violation of Title VI of

the Civil Rights Act of 1964, 42 U.S.C. § 2000d,and denies them equal protection of the laws.

Plaintiffs seek standing to contest the validity of defendants' rulings as taxpayers whose tax burdens are increased by the SECRETARY's actions. In Flast v. Cohen, 392 U.S. 83 (1968), the Court established that status as a taxpayer can, under limited circumstances, supply the personal stake essential to standing. There, the Court held that to ensure the necessary personal stake there must be "a logical nexus between the [taxpayer] status asserted and the claim sought to be adjudicated." 392 U. S. at 102. The Court found a logical nexus where the taxpayer challenged the exercise of "congres-

sional power under the taxing and spending clause of Act. 1 § 8." Ibid.

Plaintiffs here do not challenge the Congressional enactment under Article I, § 8, but, rather, actions of the Executive Branch in implementing that enactment. As such, plaintiffs have failed to satisfy the second part of the Flast nexus test. Schlesinger v. Reservists to Stop the War, 418 U. S. 208 (1973).

Count VIII alleges that the bonds which MSHDA issues are illegal under state law in that they are not "self liquidating revenue bonds." It should be noted that this allegation would not be within the federal Court's jurisdiction unless it is pendant to some federal claim.

The essence of this argument is that

the bonds issued by the Authority are not "self-liquidating: "in that it is not contemplated that they will be paid off exclusively from the repayments of loans made by the Authority. In particular, the objection is that the proceeds of federal mortgage insurance may be used to pay off the bonds.

However, the statute creating the Authority permits the Authority to use any of its funds, presumably including funds it may acquire pursuant to a contract with the federal government, to repay the bonded indebtedness. MSA § 16.144(25):

> (3) Except as may otherwise be expressly provided by the authority, every issue of its notes or bonds shall be general obligations of the authority payable out of any revenues or moneys of the authority,

> subject only to any agreements with the holders of particular notes or bonds pledging any particular receipts or revenues.

There are many references to federal programs throughout the Act creating the Authority, which clearly indicates that the legislature intended the Authority to participate in such programs. See Advisory Opinion re Constitutionality of PA 1966, No. 346, 380 Mich. 554, 578 (1968). There are further allegations that MSHDA is mismanaged but such allegations do not give a cause of action to plaintiffs.

In Count IX, plaintiffs allege that the issuance of the Authority's bonds violates the provisions of various statutes regulating securities. At oral argument plaintiffs conceded that the amended complaint does not charge

a violation of any securities statutes requiring registration. Indeed, as defendants point out, the securities of states, political subdivisions of states, and public instrumentalities of states are exempt from registration requirements. See 15 U.S.C. § 77c(a)(2) (Securities Act of 1933); 15 U.S.C. § 78c(a)(12)(Securities Exchange Act of 1934);MSA, § 19.776(402)(a)(1) (Uniform Securities Act).

Instead, plaintiffs rely on the anti-fraud provision of the various securities statutes: 15 U.S.C.§§ 77l, 77q, 78j; MSA, § 19.887(410)(a)(2). However, plaintiffs lack standing to sue under these provisions. Federal cases clearly establish that for violations of the anti-fraud provisions of either the 1933 or 1934 Acts, only

purchasers and sellers may maintain civil actions. See, e.g., Greater Iowa Corp. v. McLendon, 378 F.2d 783, 788-90 (8th Cir. 1967) (under 1933 Act, only "purchasers" of securities can sue under 15 U.S.C. § 77l, which is the section that creates a civil remedy for violations of 15 U.S.C. § 77q); Simmons v. Wolfson, 428 F.2d 455, 456 (6th Cir. 1970) cert. denied, 400 U. S. 999 (1971) ("It has long been settled that only purchasers or sellers of securities may invoke the provisions of § 10(b) of the 1934 Act or Rule 10b-5 of the Commission"). The Uniform Securities Act, as adopted in Michigan, expressly limits the class of plaintiffs:

> Any person who:
>
> . . .

> (2) Offers or sells a security by means of any untrue statement of a material fact . . .
>
> Is liable to the person buying the security from him . . .

MSA § 19.776(410)(a).

Plaintiffs also claim that there is standing under another state law doctrine, citing the Public Securities' Validation Act, MSA, § 27A.2942, and Alan v. Wayne County, 388 Mich. 210 (1972). The Public Securities Validation Act does not create a right to sue to prevent issuance of bonds. Rather, it establishes a set of procedures to be followed, "If an action contesting the validity is brought against any public body." MSA §27A.2942 (1). Even the procedures, which appear to be created to permit public bodies

to resolve all questions relating to their bonds in a single action, imply that only parties with interests in the securities are proper parties. It provides that the public body may, if sued, file a third party complaint against "persons interested in or affected by the issuance of the securities." Thus, the Act does not specifically answer the question of whether these plaintiffs have such an interest in these bonds as to permit them to challenge the sale.

The statutory scheme under which the suit in Alan v. Wayne County, 388 Mich. 210 (1972), arose is far different from that presented here. Plaintiffs place heavy reliance on the Michigan Supreme Court's requirement of specified notice to the public prior to

the issuance of the bonds and argues that the plaintiffs should be able to raise similar challenges to the various statements issued by MSHDA. However, the Alan case arose in the context of a statutory scheme that required a referendum if a specified number of signatures were obtained within 30 days of the publication of a "Notice of Intent to Issue Bonds." The Court's conclusions are premised on the notion that due process requires that this right to a referendum not be subverted by a confusing or misleading notice of intent to issue bonds: "To comport with due process any notice respecting petition rights on bonds supported by any pledge of tax power must state to whom the notice is issued and for what purpose . . .." 388 Mich.

at 352. Unlike the provisions of the Act involved in Alan (MSA, § 5.2763), the authority of MSHDA to issue bonds does not provide for such notice or referenda. See MSA, § 16.144(25).

In addition, as indicated by the language quoted above from Alan, of critical importance to that decision was the fact that the bonds involved were backed by the taxing power, providing the sort of "interest" apparently contemplated by the Michigan legislature in the Validation of Public Securities Act, supra. And the Michigan Supreme Court has unequivocally decided that MSHDA bonds are not backed by the taxing power of the state. Advisory Opinion re: Constitutionality of PA 346 of 1966, 380 Mich 554 (1968).

Count X merely seeks damages for the same wrongs discussed in Count IX. It, too, therefore, fails to state a claim upon which relief can be granted.

Count XI alleges that defendants conspired to deprive plaintiffs of their civil and constitutional rights by filing an action in the state court to foreclose the mortgages on the Second-Hendrie property.

The institution of such an action does not constitute a deprivation of plaintiffs' civil rights. The remaining allegations of the count are vague and conclusionary. To the extent that the allegations state that obligations are required by the sponsor in the agreement relating to the Second-Hendrie properties that were not required in other agreements and that

this constituted a conspiracy against SECOND AVENUE, it should be noted that Urban Housing and Planning Associates, Inc. and not SECOND AVENUE was original sponsor of the project.

In Count XII, plaintiffs allege that the defendants have conspired to damage plaintiffs' businesses in violation of § 1 of the Sherman Act. 15 U.S.C. § 1. It is well established that governmental agencies and officers do not fall within the purview of the antitrust laws, Parker v. Brown, 317 U. S. 341(1943); Alabama Power Co. v. Alabama Electric Cooperative, Inc. 394 F.2d 672 (5th Cir. 1968). This immunity is not removed by charging a conspiracy between governmental and private parties. Saenz v. University Interscholastic League, 487 F.2d 1026

(5th Cir. 1973). Although there are five private party-defendants listed in the caption of this action, there are no allegations of any acts by any of the private individuals which are in restraint of trade. Further, plaintiffs allege elsewhere in the complaint that it is the obligation of the governmental agencies and officers to perform the very acts which are alleged were to be in restraint of trade.

Plaintiffs also allege a violation of the Clayton Act but such allegation is inappropriate since no commodity is involved in the instant action.

Although motions to dismiss were filed on behalf of only some of the defendants, the basis for dismissal are also applicable to the non-moving

defendants. For the foregoing reasons, Counts I, III, IV (in part), V, VI, VII, VIII, IX, X, XI and XII are DISMISSED WITH PREJUDICE.

Counts II, IV (in part), XIII, XIV do not present federal question claims; rather plaintiffs seek resolution of state claims which are pendant to alleged federal question claims. Hurn v. Oursler, 289 U.S. 238 (1933). Pendant jurisdiction is, however, a doctrine of discretion, not of plaintiffs' right. Moynahan v. Pari-Mutual Employees Guild, 317 F.2d 209 (9th Cir. 1963). Where, as here, the federal claims are dismissed before trial, even though they are not insubstantial in a jurisdictional sense, the state claims should be dismissed as well. United Mine Workers of America

v. Gibbs, 383, U.S. 715 (1966). These counts are DISMISSED WITHOUT PREJUDICE.

Defendants in the motion to dismiss and in oral argument requested that the Court not permit plaintiffs to amend the allegation of their complaint. See 3 Moore's Federal Practice, ¶ 15.10 In view of the fact that plaintiffs have, after receiving the motion to dismiss, filed an amended complaint, the dismissal is without leave to amend.

/s/ Cornelia G. Kennedy
Cornelia G. Kennedy
United States District Judge

Dated: May 28, 1975
Detroit, Michigan

OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT DENYING PLAINTIFF'S SUPPLEMENTAL ALTERNATIVE MOTION TO ALTER OR AMEND JUDGMENT DISMISSING ACTION

[Filed June 12, 1975]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[Title Omitted in Printing]

OPINION AND ORDER DENYING PLAINTIFFS'SUPPLEMENTAL ALTERNATIVE MOTION TO ALTER OR AMEND JUDGMENT DISMISSING ACTION

Plaintiffs on June 9, 1975, filed motions entitled: "Motion to Alter or Amend and Vacate Judgment Dismissing Action"; "Alternative Motion to Reconsider and Grant a New Hearing and to Alter and Amend the Judgment in the Favor of Plaintiffs"; and "Alternative Motion for Leave to Amend First Amended Complaint".

On June 10, 1975, the instant motion was filed. It requests substantially the same relief sought in the previous three June 9, 1975 motions although the request is couched in different language.

The motion is DENIED for the reason stated in the Court's Opinion and order denying the June 9, 1975 motions.

/s/ Cornelia G. Kennedy
Cornelia G. Kennedy
United States District
Judge

Dated: June 12, 1975

A True Copy

HENRY R. HANSSEN,
Clerk

By /s/_____
Deputy Clerk

OPINION AND ORDER OF UNITED STATES DISTRICT COURT

[Filed June 12, 1975]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[Title Omitted in Printing]

OPINION AND ORDER
DENYING MOTION TO ALTER OR AMEND AND VACATE JUDGMENT DISMISSING ACTION; ALTERNATIVE MOTION TO RECONSIDER AND GRANT A NEW HEARING AND TO ALTER AND AMEND THE JUDGMENT IN THE FAVOR OF PLAINTIFFS;AND ALTERNATIVE MOTION FOR LEAVE TO AMEND FIRST AMENDED COMPLAINT

Plaintiffs have filed motions entitled: "Motions to Alter or Amend and Vacate Judgment Dismissing Action"; "Alternative Motion to Reconsider and Grant a New Hearing and to Alter and Amend the Judgment in the Favor of Plaintiffs"; and "Alternative Motion for Leave to Amend First Amended

Complaint." All three motions are in fact motions for reconsideration or rehearing. The motions present the same issues ruled upon by the Court in its Opinion and Order Granting Defendants' Motion to Dismiss (entered and filed on May 28, 1975). The brief in support of the motion directs considerable attention to the Court's refusal to permit a second amended complaint. The motions do not set forth any new matter which plaintiffs could now allege. Rather, plaintiffs state their wishes to clarify previous allegations. As the Court stated in its Opinion, the complaint did not contain a short and plain statement of plaintiffs' claims; however, the Court believes it fully understood plaintiffs' claims and theories.

Further, plaintiffs' counsel presented more than two hours of oral argument on the sufficiency of the complaint.

For the foregoing reasons the Motion to Alter or Amend and Vacate Judgment Dismissing Action, the Alternative Motion to Reconsider and Grant a New Hearing and to Alter and Amend the Judgment in the Favor of Plaintiffs, and the Alternative Motion for Leave to Amend First Amended Complaint are DENIED.

/s/ Cornelia G. Kennedy
Cornelia G. Kennedy
United States District Judge

Dated: June 12, 1975
Detroit, Michigan

A True Copy
HENRY R. HANSSEN,
Clerk

By /s/_____
Deputy Clerk

OPINION AND ORDER OF UNITED STATES DISTRICT COURT

[Filed June 12, 1975]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[Title Omitted in Printing]

ORDER DENYING
APPLICATION TO ENLARGE TIME TO FILE SUPPORTING DOCUMENTS AND BRIEF IN SUPPORT OF PLAINTIFFS' MOTION TO ALTER OR AMEND AND VACATE JUDGMENT DISMISSING ACTION; ALTERNATIVE MOTION TO RECONSIDER AND GRANT A NEW HEARING AND TO ALTER AND AMEND THE JUDGMENT IN THE FAVOR OF PLAINTIFFS; ALTERNATIVE MOTION FOR LEAVE TO AMEND FIRST AMENDED COMPLAINT

Plaintiffs have requested additional time to file supporting documents and a further brief in support of their motions: "Motion to Alter or Amend and Vacate Judgment Dismissing Action"; Alternative Motion to Reconsider and Grant a New Hearing and to Alter and

Amend the Judgment in the Favor of Plaintiffs"; and "Alternative Motion for Leave to Amend First Amended Complaint".

Extensive briefs have already been filed in this action. These motions are essentially motions for rehearing and raise no new issues. Plaintiffs presumably considered both the jurisdiction of the Court and the bases of their claims before filing this action. (Many of the same claims were set forth in the counter-claim filed in Civil Action No. 75-70332, since remanded to the Circuit Court for the County of Wayne). Plaintiffs have had adequate opportunity to brief the issues.

For the foregoing reasons, the Ex Parte Application to Enlarge Time

to File Supporting Documents and Brief in Support of Plaintiffs' Motion to Alter or Amend and Vacate Judgment Dismissing Action; Alternative Motion to Reconsider and Grant a New Hearing and to Alter and Amend the Judgment in the Favor of Plaintiffs; and Alternative Motion for Leave to Amend First Amended Complaint is DENIED.

/s/ Cornelia G. Kennedy
Cornelia G. Kennedy
United States District Judge

Dated: June 12, 1975
Detroit, Michigan

A True Copy

HENRY R. HANSSEN
Clerk

By /s/ _____
Deputy Clerk

APPENDIX B

ORDER of the United States Court of Appeals for the Sixth Circuit Affirming District Court Judgment

[Filed April 8, 1976]

No. 75-1966

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

SECOND AVENUE LIMITED DIVIDEND HOUSING ASSOCIATION, ET AL.

Plaintiffs-Appellants

v

ORDER

CARLA ANDERSON HILLS, SECRETARY OF HUD, ET AL.

Defendants-Appellees

Before: WEICK and PECK, Circuit Judges, and CECIL, Senior Circuit Judge.

This appeal has been submitted on the record on appeal and on the briefs and oral arguments of counsel for the

parties. The Court, being fully advised in the premises, concludes that the judgment of the trial court should be affirmed for the reasons set forth in the opinion filed by District Judge Cornelia G. Kennedy, and on the additional authority of Warth v. Seldin, ____ U.S. ____, 95 S.Ct. 2197 (June 25, 1975). Accordingly,

IT IS ORDERED that the judgment of the district court be and it hereby is affirmed.

ENTERED BY ORDER OF THE COURT

/s/ John A. Hehman
Clerk

APPENDIX C

Order of the United States Court of Appeals for the Sixth Circuit Denying Second Avenue's Petition for Rehearing.

[Filed May 25, 1975]

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

[Title Omitted in Printing]

Before: WEICK and PECK, Circuit Judges, and CECIL, Senior Circuit Judge.

Plaintiffs-appellants' position for rehearing having come on to be considered and of the judges of this Court who are in regular active service less than a majority having favored ordering consideration en banc, the petition has been referred to the panel which heard the appeal, and it further appearing that the petition for rehearing is

without merit,

IT IS ORDERED that the petition be and it hereby is denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

APPENDIX D

U. S. Const. Amend. XIV §§ 1 and 5

> Section 1. All persons born or naturalized in the United states, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> ***
>
> Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

U. S. Const. Amend. V

> No person shall be
>
> ***
>
> deprived of life, liberty, or

property, without due process of law; nor shall private property be taken for public use, without just compensation.

U. S. Const. Amend. IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

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5 U. S. C. § 702 (1966)

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

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12 U. S. C. § 1702 (1967)

The powers conferred by this chapter shall be exercised by the Secretary of Housing and Urban Development (hereinafter referred to as the "Secretary"). In order to carry out the provisions of this subchapter and

subchapters II, III, V, VI, VII, VIII, X, IX-A, and IX-B of this chapter, the Secretary may establish such agencies, accept and utilize such voluntary and uncompensated services, utilize such Federal officers and employees and, with the consent of the State, such State and local officers and employees, and appoint such other officers and employees as he may find necessary, and may prescribe their authorities, duties and responsibilities. The Secretary may delegate any of the functions and powers conferred upon him under this subchapter and subchapters II, III, V, VI, VII, VIII, X, IX-A, and IX-B of this chapter to such officers, agents, and employees as he may designate or appoint, and may make such expenditures (including expenditures for personal services and rent at the seat of government and elsewhere, for law books, and books of reference, and for paper, printing, and binding) as are necessary to carry out the provisions of this subchapter and subchapters II, III, V, VI, VII, VIII, X, IX-A, and IX-B of this chapter, without regard to any other provisions of law governing the expenditure of public funds. All such compensation, expenses, and allowances shall be paid out of

funds made available by this chapter: Provided, That notwithstanding any other provisions of law except provisions of law hereafter enacted expressly in limitation hereof, all expenses of the Department of Housing and Urban Development in connection with the examination and insurance of loans or investments under any subchapter of this chapter, all properly capitalized expenditures, and other necessary expenses not attributable to general overhead in accordance with generally accepted accounting principles shall be considered nonadministrative and payable from funds made available by this chapter, except that, unless made pursuant to specific authorization by the Congress therefor, expenditures made in any fiscal year pursuant to this proviso, other than the payment of insurance claims and other than expenditures (including services on a contract or fee basis, but not including other personal services) in connection with the acquisition, protection, completion, operation, maintenance, improvement, or disposition of real or personal property of the Department acquired under authority of this chapter, shall not exceed 35 per centum

of the income received by the Department of Housing and Urban Development from premiums and carrying out the provisions of this subchapter and subchapters II, III, V, VI, VII, VIII, X, IX-A, and IX-B, of this chapter, be authorized in his official capacity, to sue and be sued in any court of competent jurisdiction, State or Federal.

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15 U. S. C. § 1 (1955)

§1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: Provided, That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commo-

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dities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: Provided further, That the preceding proviso shall not make unlawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall

be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

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28 U. S. C. §1331 (1958).

§1331. Federal question; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may

impose costs on the plaintiff.

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42 U. S. C. §1981 (1870)

§1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

---

42 U. S. C. §1982 (1866)

§1982. Property rights of citizens

All citizens of the United States shall have the same right, in every state and territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

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42 U. S. C. §1983 (1871)

§1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

---

42 U. S. C. §2000d (1964)

§2000d. Prohibition against exclusion from participation in, denial of benefits of, and discrimination under federally assisted programs on ground of race, color, or national origin

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial

assistance.

---

42 U. S. C. §2000d-1 (1964)

§2000d-1. Federal authority and financial assistance to programs or activities by way of grant, loan, or contract other than contract of insurance or guaranty; rules and regulations; approval by President; compliance with requirements; reports to Congressional committees; effective date of administrative action

Each Federal Department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guanranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the

President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited in its effect to the particular program, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: Provided, however, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file

with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

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42 U. S. C. §2000d-2 (1964)

§2000d-2. Judicial review; Administrative Procedure Act

Any department or agency action taken pursuant to section 2000d-1 of this title shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds. In the case of action, not otherwise subject to judicial review, terminating or refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to section 2000d-1 of this title, any person aggrieved (including any State or political subdivision thereof and any agency of either) may obtain judicial review of such

action in accordance with section 1009 of Title 5, and such action shall not be deemed committed to unreviewable agency discretion within the meaning of that section.

---

42 U. S. C. §2000d-3 (1964)

§2000d-3. Construction of provisions not to authorize administrative action with respect to employment practices except where primary objective of Federal financial assistance is to provide employment

Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

---

42 U. S. C. §2000d-4 (1964)

§2000d-4. Federal authority and financial assistance to programs or activities by way of contract of insurance or guaranty

Nothing in this subchapter shall add to or detract from any existing authority with respec t to any program or activity under which Federal financial assistance is extended by way of a contract of insurance or guaranty.

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42 U. S. C. §2000d-5 (1968)

§2000d-5. Prohibited deferral of action on applications by local educational agencies seeking federal funds for alleged non-compliance with Civil Rights Act

The Commissioner of Education shall not defer action or order action deferred on any application by a local educational agency for funds authorized to be appropriated by this Act, by the Elementary and Secondary Education Act of 1965, by the Act of September 30, 1950 (Public Law 874, Eighty-first Congress), by the Act of September 23, 1950 (Public Law 815, Eighty-first Congress), or by the Cooperative Research Act, on the basis of alleged noncompliance with the provisions of this subchapter for more than sixty days after notice is given to such local agency of such deferral unless

such local agency is given the opportunity for a hearing as provided in section 2000d-1 of this title, such hearing to be held within sixty days of such notice, unless the time for such hearing is extended by mutual consent of such local agency and the Commissioner, and such deferral shall not continue for more than thirty days after the close of any such hearing unless there has been an express finding on the record of such hearing that such local educational agency has failed to comply with the provisions of this subchapter: Provided, That, for the purpose of determining whether a local educational agency is in compliance with this subchapter, compliance by such agency with a final order or judgment of a Federal court for the desegregation of the school or school system operated by such agency shall be deemed to be compliance with this subchapter, insofar as the matters covered in the order or judgment are concerned.

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42 U. S. C. §3939 (1968)

§3939. Applicability of antitrust laws

Nothing contained herein shall affect the applicability of the Federal antitrust laws to the activities of the corporation and the partnership created under this chapter and of the persons participating therein or in partnerships, limited partnerships, or joint ventures with either of them.

Fed. R. Civ. P. 12(b)(1) and 12(b)(6)

Rule 12. Defenses and Objections-When and How Presented-By Pleading or Motion-Motion for Judgment on the Pleadings

***

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:

(1) lack of jurisdiction over the subject matter.

***

(6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

EXHIBIT E

"'The current Supreme Court has made a mockery of the motion of direct and uncomplicated access to federal courts', say Arych Neier and Burt Neuborne", July/August, 1976, Juris Doctor, p. 34.

Supreme Court decisions have delivered severe blows to the public interest bar, shut off access to the federal courts, and restricted the ability of federal courts to grant meaningful remedies. Here is part of their testimony on access.

Since the Civil War, the federal trial courts have served as the primary enforcement arm of the Bill of Rights and Thirteenth, Fourteenth, and Fifteenth Amendments. While state courts retain a concurrent obligation to enforce the federal Constitution, it

has been the lesson of our history--and it remains the fixed belief of virutally every experienced civil rights lawyer in America--that federal courts provide the most effective forum within which to enforce the Constitution of the United States.

Congress has codified this judgment in the Civil Rights Act of 1871 (42 USC §1983), which guarantees a federal judicial forum whenever state or local officials interfere with federal constitutional or statutory rights. Unfortunately, the command of Congress has been severely weakened by the current Supreme Court.

First, in cases like Warth v. Seldin (1975) and Rizzo v. Goode (1976) a majority of the current Court has

restricted the class of persons who may complain to the federal courts about violations of their federal constitutional rights. In Warth, the Court ruled that minority residents of the Rochester area could not challenge suburban exclusionary zoning practices, which condemned them to a ghetto existence, because they were unable to point to a specific housing project which they would have resided in, but for the exclusionary zoning. Of course, the very existence of exclusionary zoning prevented the planning or construction of such projects--reducing the decision to a crude exercise in Catch-22. In Rizzo, the Court ruled that black citizens of Philadelphia, who had been the target of proven police abuse, could not seek

an order directing the mayor to establish a police complaint procedure, since they were not currently suffering any abuse at his hands. The extremely crabbed view of the standing enunciated in cases like Warth and Rizzo as a "prudential" matter by a majority of the Court leaves thousands of Americans with festering constitutional grievances, but without a federal court within which to resolve them in an orderly manner.

Second, in cases like Paul v. Davis (1976), the current Court has read the Civil Rights Act of 1871 in a grudging manner to refuse access to the federal courts to persons who have been seriously injuryed by lawless government action (see page 35).

Third, the current Court has dra-

matically expanded the doctrines of abstention and comity to force case after case out of federal court. Despite the ruling of Monroe v. Pape (1961) that civil rights plaintiffs are not obliged to exhaust state judicial remedies prior to seeking relief in federal court, the current Supreme Court has clamped a de facto state judicial exhaustion requirement on civil rights plaintiffs--imposing a delay of from one to two years before many civil rights plaintiffs may gain access to a federal forum.

The availability of expeditious federal relief from constitutional violations has been a critical factor in transforming abstract constitutional doctrine into practical reality. Accordingly, the draftsmen of the Civil

Rights Act of 1871 and eight members of the Supreme Court in Monroe v. Pape recognized that the delay which would be caused by requiring resort to state court as a pre-condition to federal judicial review would destroy 42 USC §1983 as an effective device for the protection of federal constitutional rights. Accordingly, it is now well settled that a civil rights plaintiff need not exhaust state judicial remedies before seeking federal judicial review under the Civil Rights Act of 1871. Unfortunately, however, the current Court has made a mockery of the notion of direct and uncomplicated access to federal courts by imposing at least three forms of state exhaustion on prospective civil rights plaintiffs.

First, in Preiser v. Rodriguez (1973), the current Court invented a species of cases falling within the term "core habeas corpus" in connection with which it imposed a requirement of exhaustion of state judicial remedies.

Second, in a series of cases exemplified by Boehning v. Indiana State Employees Association (1976), the current Court has dramatically broadened the concept of abstention into a virtual de facto exhaustion requirement. In the view of Chief Justice Burger, and perhaps a majority of the current Court, whevnever the challenged action of a state official might violate a state constitutional or statutory law, a civil rights plaintiff must seek relief in state court on

state law grounds, prior to seeking relief in federal court.

Finally, in the wake of Younger v. Harris (1971), which forbade federal judicial interference with pending state criminal proceedings, the current Court has ousted the federal courts from wide areas of constitutional adjudication in the guise of comity. In Huffman v. Pursue, Ltd. (1971), the Court declined to permit a federal court to enjoin an unconstitutional state civil court injunction. Thus, by the simple expedient of commencing a state civil proceeding against a potential federal civil rights plaintiff, state officials can now deprive that plaintiff of access to a federal court. Moreover, in Hicks v. Miranda (1975), the current Court ruled that even if a

federal plaintiff wins the race to the courthouse and seeks federal judicial review prior to the initiation of state judicial proceedings against him, the state may nevertheless oust the federal courts by filing a proceeding even after the federal action is filed.

The net result of expanding the law of standing, narrowing the cause of action granted by the Civil Rights Act of 1871, and pyramiding abstention and comity into a disguised exhaustion requirement has been the creation of a jurisdictional maze which must be run in order to gain federal review of federal constitutional questions--a far cry from the simple, direct, and effective remedy intended by Congress in 1871. Unless Congress reasserts

its will, the current Court bids fair to repeal 42 USC §1983 by judicial fiat.

"In Praise of Simplicity", Irving Younger, A. B. A. J., May, 1976, p. 632

Practitioners of other disciplines know that simplicity is the mark of the master. But lawyers and judges violate the basic standards of simplicity and create needless confusion. Why not pledge adherence to the virtues of lucidity, candor, aesthetics, efficacy, and elegance?

I write in praise of a virtue--an intellectual virtue called simplicity.

It has long been understood by practitioners of disciplines other than the law that simplicity marks the master. Simplicity walks hand in

hand with high seriousness, not as a child better left behind, but as the very herald of large intention and great accomplishment.

How stands simplicity with us, the lawyers and judges? Not well, I fear. Walk through a law library and observe the shelves bulging with treatises, statutes, law reviews, regulations, digests, and case reports. Whatever its other charms and virtues, the law is hardly simple.

Worse, the law has made of simplicity a vice, the shameful badge of a mind too lazy or too weak to be admirably complicated. Who doesn't recall a professor at law school saying, "Really, that won't do, it's just too simple"? Or an appellate court saying, "The judge below apparently failed to grasp the complexity of the problem"? Or a judge saying to a lawyer, "Counselor, isn't your argument far too simple?" If lawyers, judges, legislators, and law professors were only brave enough to be simple, the law would be improved in five different ways.

Lucidity is an Essential

First, lucidity. Much of what lawyers and judges say is incomprehensible. Here is an example drawn from a recent issue of a leading law review. One of our most distinguished professors writes an article about entrapment, from which I quote a footnote: "However, entrapment is examined primarily to demonstrate the need for a rule shift in overseer focus from citizen to authority and not to detail what

might constitute appropriate police conduct." What does this mean" One can discover the author's through only be shoveling away the rubbish of complexity, and that is an undesirable state of affairs. A legal system, like any system of thought, should be clear. Lawyers and judges have an obligation to the public to speak lucidly about the law, to practice simplicity of language.

Candor Should Have a Place

Second, candor. Lawyers and judges should call things by their right name and state the real reasons for what they do. Only then will it be possible to engage in intelligent analysis and criticism, exposing and correcting error, eliminating irrationality, and transmitting to our successors a body

of law better and more coherent than the one we inherited. Yet many of us have fallen into a habit that dishonors candor. Things are not called by their right name but by elaborate wrong names. Decisions are not explained as what they are but as something else, easier and always more complicated than the truth.

Here is one example from a recent Supreme Court decision. In Warth v. Seldin, 422 U.S. 490 (1975), various petitioners sued the town of Penfield, a suburb of Rochester, New York, claiming that its zoning ordinance unlawfully operated to exclude persons of low and moderate income from living there. The Supreme Court dismisesed for lack of standing. Read the majority opinion and ask yourself

whether standing is really the problem. I think you'll say no, the real problem is that the petitioners raised enormously sensitive issues of race and economic class the Court was unwilling to face. It chose to avoid them by adding some very complicated wrinkles to the already vexed law of standing.

But wouldn't it have been better for the Court to say straight out that some issues can be decided only when the time is right and that the time was not right for the issues in this case? The simple approach serves where the disingenuous fails. Candor is appreciated in judicial opinions, as elsewhere.

Aesthetics and the Internal Revenue Code

Third, aesthetics. Beauty may exist in

a legal system as well as in a salt-cellar by Cellini. We should seek beauty everywhere and take pleasure in it wherever we find it, even in a statute. Here is Section2-302(1) of the Uniform Commercial Code. It says simply that "If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made, the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause as to avoid any unconscionable result." That section is a thing of beauty.

Contrast it with the Internal Revenue Code. The aesthetic pleasure we take in our profession would be vastly increased were some federal judge

one fine morning to announce the following opinion (which I freely give to any judge who wishes to use it):

"This is a class action in which the plaintiff-taxpayer, on behalf of himself and all others similarly situated (which includes, I suppose, roughly 100 per cent of the population of the United States), sues for a judgment declaring the Internal Revenue Code unconstitutional. His argument is (1) that he does not understand it, (2) that no one can understand it, and hence (3) that it is invalid. The theory is novel, to be sure, but not for that reason necessarily wrong.

"Let us examine the code.

"Item. I doubt that the ordinary citizen can grasp the meaning of a

sentence more than fifty words long. The code contains sentences of 385 words (Section 6651(a)), of 379 words (Section 179(b)(1)(A)), and of 506 words (Section 7701(a)(19)).

"Item. Apart from mere length, I doubt that the ordinary citizen can grasp the meaning of a sentence which does not run more or less in a straight line from beginning to middle to end. What then is he to make of the last sentence of Section 509(a): 'For purposes of paragraph (3), an organization described in paragraph (2) shall be deemed to include an organization described in Section 501(c)(4), (5), or (6) which would be described in paragraph (2) if it were an organization described in Section 501(c)(3)'?

"Item. One of the great achievements of our technological society is an arithmetic based on units of ten, thus permitting the easy manipulation of decimals. Yet the code fixes the accumulated earnings credit for certain groups of commonly controlled corporations at $83,333 for 1970 and $66,667 for 1971. It fixes the multiple surtax exemption at $20,833 for 1970 and $16,667 for 1971. It fixes the retirement income credit for years before 1969 at 15 per cent of $1,524.

"Item. A statute should be at least moderately straight forward. The code, however, sets up no less than fourteen different categories of charitable foundation subject to thirty-four different benefits and burdens, for a

total of 476 separate combinations.

"I do not wish to expand this opinion unduly, and so, for additional illustrations, I refer interested persons to any page of the Internal Revenue Code selected at random.

"The due process clause means many things. One of them, assuredly, is that the enactments of Congress, whatever their subject matter, be comprehensible to a citizen of average intelligence upon the application of reasonable diligence. I find that the Internal Revenue Code does not meet that standard.

"This may be the first case holding a statute void for rampant complexity. I hope it will not be the last. The Internal Revenue Code is declared unconstitutional under the due pro-

cess clause."

Law Needs Efficacy

Fourth, efficacy. Much of the law would work better were it simpler, and here is a sketch of the reason why.

There are two kinds of legal rule. One speaks primarily to lawyers. For example, the rule against perpetuities governs a lawyer sitting at his desk calmly drafting a will or trust indenture. It tells him what he may do and what not; but it affects the conduct of lay persons only from a distance, through its effect on the conduct of lawyers.

The other kind of rule speaks primarily to lay persons, telling them directly what they may do in their own lives. Mapp v. Ohio, 367 U.S.

643 (1961), is an example of this. It excludes in a criminal case evidence obtained by policemen in violation of the Fourth Amendment rights of the defendant. At first glance, this might seem a rule of the first kind, telling lawyers and judges what evidence is admissible or inadmissible at trial. But really it is a rule of the second kind. Assuming that the purpose of the rule is deterrence--to deprive law enforcement officers of the advantage of illegal searches and seizures and hence to deter them from committing illegal searches and seizures--we see that the rule's primary concern is to regulate the conduct of policemen on the street, not of lawyers and judges in the courtroom. Then shouldn't the rule by sim-

ple? If a policeman can't understand it or with certainty apply it in the hectic circumstances of an arrest, he will ignore it--not out of malice, but because it's human nature to ignore the inexplicable. And when the policeman ignores the rule, constitutional violations will occur.

Now look at the exclusionary rule and see how it measures up. The rule excludes illegally obtained evidence. But when is evidence illegally obtained? That is the real question, and to it, as we all know, the Supreme Court has given answers so numerous, so inconsistent, and so complicated that no lawyer and certainly no policeman can understand them. Take Collidge v. New Hampshire, 403 U.S. 443 (1971), a case involving run-of-

the-mill police conduct. The nine justices produced five opinions and a proliferation of explanations that make it impossible to state the holding of the case. With search-and-seizure law at such a pass, can we say that the exclusionary rule deters? It can't be understood. Therefore, it can't deter. Yet we want it to deter.

Then we must change the rule so that it works, and the way to change it is to make it simple. Instead of a tangle of exceptions, qualifications, exceptions to the qualifications, and qualifications to the exceptions, we need a rule something like this: No search is good unless supported by a search warrant; no arrest is good unless supported by an arrest warrant; only when there is insufficient time

to secure one will the requirement of a warrant be excused; when the requirement of a warrant is excused, the test of legality is the policeman's good faith. That, I submit, is a better rule than the rat's nest the Supreme Court has given us. Policemen will comply with it, and it's the job of a moment for a judge to apply it. The source of these benefits, note, is simplicity. A simple rule--at least one of the second kind, speaking primarily to nonlawyers--is more effective than a complicated rule. It simply works better.

Is There No Place for Elegance?

Fifth, elegance. Six and a half centuries ago, William of Occam wrote, "Pluralites non est ponenda sine necessitate." We know this as Occam's

Razor: given two ways of saying or doing or explaining something, one simpler than the other, always choose the simpler. This is an axiom of all intellectual work. The simple is more likely than the complex to be "true", and if "truth" is too complex a measure, then put it that the simple is more elegant than the complex.

For example, the keystone rule in the law of evidence is the rule against hearsay. Hearsay is not admissible--with exceptions, of course. In the Federal Rules of Evidence, there are twenty-seven specific exceptions and a catch-all, essentially for any other hearsay as good as that which the rules specifically make admissible. That's complicated, and because it's complicated, it's inelegant. Why

not reformulate the rule to say that hearsay is admissible unless the trial judge in his or her sound discretion thinks it fair to exclude it. That's the rule judges apply most of the time anyway. It's as much as any appellate court can do with hearsay. And it turns a clumsy contraption of exception piled upon exception into an object of plain and simple elegance.

Let's Recognize the Virtue of Simplicity

Simplicity is a virtue good in itself, as artists and scientists long have known. It would make our craft and mystery more lucid, candid, beautiful, effective, and elegant. I want simplicity for the law because I love the law, and if this praise seems overfond and foolish, call it lover's

folly and be patient with me for my love's sake.

Supreme Court, U. S.
FILED
JAN 4 1977
MICHAEL RODAK, JR., CLERK

No. 76-670

In the Supreme Court of the United States

OCTOBER TERM, 1976

SECOND AVENUE LIMITED DIVIDEND HOUSING ASSOCIATION, ET AL., PETITIONERS

v.

CARLA A. HILLS, SECRETARY OF THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

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SECOND AVENUE LIMITED DIVIDEND HOUSING ASSOCIATION, ET AL., PETITIONERS

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

The petition for a writ of certiorari was filed out of time. The judgment of the court of appeals in this civil matter was entered on April 8, 1976 (Pet. App. B), and a petition for rehearing *en banc* was denied on May 25, 1976 (Pet. App. C). The time for filing a petition for a writ of certiorari was not extended and, accordingly, the 90-day period provided in 28 U.S.C. 2101(c) for petitioning in civil cases expired on August 23, 1976. The petition was filed on November 12, 1976.

The time limit imposed by 28 U.S.C. 2101(c) is jurisdictional. *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U.S. 399, 417-418. Accordingly, the petition should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JANUARY 1977.

DOJ-1977-01

Supreme Court, U. S.
FILED
DEC 15 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976

SECOND AVENUE LIMITED DIVIDEND HOUSING ASSOCIATION, et al,
Petitioners,

vs.

CARLA ANDERSON HILLS, Secretary, Department Housing & Urban Development, et al,
Respondents.

No. 76 670

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF RESPONDENT MICHIGAN STATE HOUSING DEVELOPMENT AUTHORITY IN OPPOSITION

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IN THE

Supreme Court of the United States

October Term, 1976

SECOND AVENUE LIMITED DIVIDEND HOUSING ASSOCIATION, et al,
Petitioners,

vs. **No. 76 670**

CARLA ANDERSON HILLS, Secretary, Department Housing & Urban Development, et al,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF RESPONDENT MICHIGAN STATE HOUSING DEVELOPMENT AUTHORITY IN OPPOSITION

OPINIONS BELOW

JURISDICTION

The unreported opinion and judgment of the Court of Appeals, affirming the District Court, were entered April 8, 1976 (Appendix, 48). The instant petition was filed with this Court on November 12, 1976, considerably more than 90 days thereafter. No extension of time for applying for a writ of certiorari was granted or even requested by Petitioners.

A Petition for Rehearing before the Sixth Circuit was filed April 28, 1976 and denied as being "without merit" on May 25, 1976. On or about August 19, 1976 Petitioners filed in this Court a Motion for leave to proceed *in forma*

pauperis and to dispense with printing the petition which was denied on October 4, 1976.

Under any proper computation of the 90-day period, the petition filed on November 12, 1976 was not timely. Pursuant to 28 U.S.C. §2101(c), this Court lacks jurisdiction of this matter.

STATUTE INVOLVED

The statute governing the time for filing a petition for certiorari directed to a court of appeals in a civil action is 28 U.S.C. §2101(c):

> "Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days before the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."

ADDITIONAL QUESTIONS INVOLVED

1. Whether this Court has jurisdiction to entertain the instant petition filed more than ninety days after entry of the opinion and judgment of the Court of Appeals?

2. Whether the questions presented by Petitioner in this Court merit consideration under any of the standards for granting a writ of certiorari?

STATEMENT OF THE CASE

The stated nature of this case, according to the Complaint and First Amended Complaint was broad ranging and massive violations of federal housing statutes, federal and

state antitrust laws, the federal and state securities acts, the United States and Michigan Constitutions, the Internal Revenue Code, the Civil Rights Acts of 1867, 1964 and 1968, breach of contract, breach of fiduciary duty, misrepresentation, fraud and deceit. This catalog of theories was asserted to support various injunctions, mandamus, accounting, imposition of a constructive trust, receivership, declaratory judgment, invalidation of outstanding bonds, and damages totaling approximately $13,000,000.00. The principal defendant was the Michigan State Housing Development Authority ("The Authority"), an instrumentality of the State of Michigan. The Authority sought prompt resolution of these matters, because the Complaint and First Amended Complaint sought to declare all prior bond issues of the Authority illegal and void, sought to enjoin the Authority from use of any proceeds of any bonds which it had on hand, for any purpose, even to pay off prior bonds, sought to declare all statutes of the State of Michigan as applied to Plaintiff unconstitutional, sought to enjoin the Authority from issuing any more bonds or notes, sought to have a receiver appointed for the Authority, sought to have the Authority enjoined from participating in any federal programs, and sought to enjoin the Authority from any further processing, evaluation, or making of loans for low or moderate income housing projects or developments in the State of Michigan.

Notwithstanding this broad spectrum of allegations, the Authority submits that the true nature of this case may be ascertained by reviewing the history of litigation between the parties commencing in January, 1975. The same sweeping charges were first contained in a counterclaim filed in response to a complaint filed in Wayne County Circuit Court for foreclosure of a mortgage previously issued by

the Authority to Petitioner Second Avenue Limited Dividend Housing Association ("Second Avenue"). That Counterclaim, somewhat enlarged and lengthened, became the Complaint first filed in the present case, which in turn became the First Amended Complaint filed by Petitioners on the very day of the hearing of the Authority's motions to dismiss the Complaint.

The Authority's work includes the important public function of raising money by the sale of bonds and notes, which money it uses to make loans to finance the construction and rehabilitation of housing for persons of low or moderate income. In pursuance thereof, in 1972 the Authority and Citizens Mortgage Corporation agreed to and did lend Petitioner Second Avenue $1,798,000.00, taking a mortgage in return. The Authority filed its Compaint to foreclose this mortgage on January 28, 1975, in Wayne County Circuit Court, Civil Action No. 75 054 287. Second Avenue removed the foreclosure action to the United States District Court, where it became No. 75-70332, and filed and served a counterclaim. That Counterclaim was shorter than, but contained a substantial number of the allegations contained in, the Complaint and First Amended Complaint which are the subject of this present appeal. The Authority, because of the lack of jurisdiction, promptly sought to remand the matter to the State Court, filing its Motion to this effect on April 30, 1975. On May 5, 1975, Second Avenue filed its Motion to Disqualify the Authority's counsel, and, when this motion, together with a request that the entire proceedings be stayed, was denied from the bench on May 5, 1975, Second Avenue filed a Petition for Writ of Mandamus in the Sixth Circuit on May 8, 1975, No. 75-1492. On May 12, 1975, the adjourned date for hearing the Authority's Motion to Remand, Second Avenue filed an

Amended Petition for Removal, and on the same day, the District Court entered its Order granting the Authority's Motion to Remand. Second Avenue appealed to the Sixth Circuit from the granting of this Order, No. 75-1773. The Petition for Writ of Mandamus in No. 75-1492 was denied on July 10, 1975. The appeal from the Order of Remand in No. 75-1773 resulted in affirmance of the District Court's decision, in an Opinion filed by the Sixth Circuit October 1, 1975.

The Complaint in the instant cause was filed on May 1, 1975. On May 15, 1975, the Authority filed its Motion to Dismiss the Complaint, together with other motions directed to the Complaint and to particular portions thereof. The matter was set for hearing on May 27, 1975. On May 22, 1975, counsel for Second Avenue sought to adjourn the hearing date on grounds that Second Avenue needed certain factual discovery. On the same day, the Court entered its Order limiting the scope of the hearing scheduled for May 27, 1975, to matters involving only legal issues. On May 27, 1975, Plaintiffs filed and served their First Amended complaint and the hearing was held on the Authority's motions directed to both the Complaint and the First Amended Complaint. The District Court considered extended oral argument and entered its Opinion granting the Authority's motions to dismiss (App. 3), and on the same day entered its Judgment of Dismissal (App. 1). Plaintiffs' subsequent motions directed toward altering, amending, and vacating the Judgment were denied by Orders of the Court dated June 12, 1975, and filed June 13, 1975. (App. 39, 41, 44). Plaintiffs filed a Notice of Appeal to the Sixth Circuit on June 26, 1975.

After extensions of time were sought and obtained for filing Plaintiffs' Brief, the Sixth Circuit heard oral argu-

ment on April 5, 1976 and issued its *per curiam* opinion and judgment on April 8, 1976 (App. 47). A motion for rehearing was filed on April 28, 1976 and was denied summarily on May 25, 1976 (App. 49).

On August 19, 1976 Petitioners filed with the Clerk of this Court a "Motion for Leave to Proceed in Forma Pauperis and Motion for Order Dispensing Printing Requirements for Brief, Appendix and All Pleadings and Papers in the Proceeding in Unprinted Form" and, at the same time, attempted to file a petition for certiorari which was not in the form required by the rules of this Court. That Motion was denied by Order of this Court dated October 4, 1976. The present Petition for a Writ of Certiorari was filed November 12, 1976 and received by counsel on November 15, 1976.

ARGUMENT

I.

THIS COURT LACKS JURISDICTION BECAUSE THE PETITION FOR CERTIORARI WAS NOT TIMELY FILED.

Petitioners seek review of the opinion and judgment entered by the United State Court of Appeals for the Sixth Circuit on April 8, 1976. The petition for certiorari was docketed in this Court on November 12, 1976. Ninety days after April 8, 1976 was July 7, 1976.

The Petition makes no attempt at claiming timeliness; it merely states the dates of the actions of the Sixth Circuit. Presumably Petitioners will claim that the ninety day period began anew from the Sixth Circuit's denial of the petition for rehearing on May 25, 1976, that the purported petition filed August 19, 1976 was within that period, and that

the pendency before this Court of the motion for leave to proceed *in forma pauperis* tolled the further running of the ninety day period. This claim is not only inconsistent with the decisions of this Court regarding computation of the ninety day period,[1] but, even if accepted, does not make the November 12, 1976 petition timely. Ninety days after May 25, 1976 would have been August 24, 1976. The filing of the motion and attempted filing of the improper petition on August 19, 1976 left five days unexpired in this period. The motion was denied on October 4, 1976 but the present Petition was not filed until November 12, 1976. Under any conceivable computation of the ninety day period, the Petition was not timely.

It has long been established that the time requirements for a petition for a writ of certiorari to a court of appeals in a civil action are jurisdictional and that failure to comply with such time requirements precludes consideration of the petition by this Court.[2] *Hartford Accident & Indemnity Co.* v. *Bunn*, 285 U.S. 169, 177-78 (1932); *Gotham Can Co.* v. *United States*, 281 U.S. 706 (1930); *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U.S. 399, 418 (1923). Consequently, Re-

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[1] *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952); *Federal Trade Commission* v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206,211 (1952).

[2] A different rule may apply in other circumstances: (a) in criminal petitions for certiorari where the time requirements are established not by statute but by Supreme Court rule which occasionally has been waived, see, *e.g.*, *Durham* v. *United States*, 401 U.S. 481 (1971) (b) in direct appeals or petitions for certiorari to trial courts after post-trial motions, see, *e.g.*, *United States* v. *Adams*, 383 U.S. 39 (1966) and Rule 4, F.R.A.P.; and (c) in appeals or petitions for certiorari to the highest court of a state where the local rules provide that a motion for rehearing operates as an automatic stay, see, *e.g.*, *Department of Banking* v. *Pink*, 317 U.S. 264 (1942). Rules 35(c) and 40, F.R.A.P., and Sixth Circuit Rule 3(b) make clear that the petition for rehearing did not suspend the finality of the April 8, 1976 opinion and judgment.

spondent Michigan State Housing Development Autority respectfully submits that the petition for certiorari filed by Petitioner on November 12, 1976 was not timely, may not be considered, and should be denied.

II.

PETITIONERS HAVE SHOWN NO BASIS FOR GRANTING A WRIT OF CERTIORARI

The Petition raises nothing new. It rehashes the same tired, vague, conclusory allegation and arguments rejected on numerous occasions by the two courts below. It cites precisely the same case authority for the same general conclusions about standing, right of action, and antitrust immunity. There are no clear, precise issues of importance presented for this Court's resolution. Rather, there is the same broad claim that the actions of the lower courts are in conflict with nearly every important decision of this Court in its last two terms. The present petition is merely the last gasp in a two year struggle to impede foreclosure of a mortgage by the Authority and do not merit consideration by this Court.

Petitioners attempt to construct some inconsistency between the decisions in the present case and that of this Court in *Hills* v. *Gautreaux*, __ U.S. __, 96 S. Ct. 1538 (April 20, 1976) and the Third Circuit in *Shannon* v. *HUD*, 436 F.2d 809 (3rd Cir. 1970). Even a cursory reading of those cases discloses that the only similarity between them and the present case is that they involve housing. Neither the factual nor the legal issues involved are remotely similar.

Petitioners tacitly admit (Pet. 24-5) that *Warth* v. *Seldin*, 422 U.S. 490 (1975), decided after the decision of the District Court, is conclusive as to their lack of standing and merely argue that *Warth* was wrongly decided.

Finally, Petitioners cite one new case, *Cantor* v. *The Detroit Edison Company*, __ U.S. __, 49 L.Ed.2d 1141 (July 6, (1976), in an attempt to breathe life into an antitrust claim against governmental agencies and officials. *Cantor* neither requires nor permits such a conclusion.

The remaining arguments in the Petition are merely directed to the claim that the lower courts incorrectly applied well accepted legal standards. As such, those arguments present no basis for granting the Petition under Rule 19.

No novel or significant legal issues are presented by the Petition. No conflict among the Circuits or between the Sixth Circuit and the decisions of this Court are presented. The only real claim presented is that this Court assist petitioners' efforts to delay foreclosure of a mortgage which has been in default since 1972. The Michigan State Housing Development Authority respectfully submits that this Court, like the two courts below, should reject those efforts which are neither timely nor meritorious.

CONCLUSION

The Petition for a writ of certiorari should be denied.

Respectfully submitted,
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Dated: December 15, 1976

Supreme Court, U.S.
FILED
JAN 14 1977
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976

SECOND AVENUE LIMITED DIVIDEND HOUSING ASSOCIATION, et al,

Petitioners,

v. No. 76-670

CARLA ANDERSON HILLS, Secretary, Department of Housing and Urban Development, et al,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONERS' REPLY TO BRIEFS IN OPPOSITION

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PETITIONERS' REPLY TO BRIEFS IN OPPOSITION

JURISDICTION

This appeal is taken pursuant to 28 U.S.C. §1254(1) and is supported by the Petition for Writ of Certiorari filed with this Court, in conformity with Rule 53 of the U. S. Supreme Court and 28 U.S.C. §1915, on August 19, 1976. Accompanying the petition were Petitioner-Appellant Second Avenue Limited Dividend Housing Association's ("Second Avenue") Motion for Leave to Proceed In Forma Pauperis and Motion for Order Dispensing of Printing Requirements. Simultaneously with the aforementioned filing, copies of Petitioners' Petition for Writ of Certiorari and accompanying papers were served on all counsel for Respondents.

On August 24, 1976, Petitioners' counsel sent a letter to Mr. Michael Rodak, Jr.,

Clerk of this Court, to evidence prior telephone conversations of August 12 and August 20, 1976, and to confirm the procedure available to Petitioners by reason of the filing of Second Avenue's Motion for Permission to Proceed In Forma Pauperis. The Clerk of this Court advised that the Petition for Writ of Certiorari would be dated as of August 20, 1976 and that in the event this Court denied Second Avenue's Motion for Permission to Proceed In Forma Pauperis, this Court would notify Petitioners as to the amount of time in which they would be given to re-submit their Petition for Writ of Certiorari in compliance with the Rules as to the form of the petition.

Under date of October 4, 1976, the Clerk of this Court advised counsel for Petitioners that "The motion for

petitioners leave to proceed in forma pauperis or in the alternative to dispense with printing the petition is denied" without specifying any time from the date of the entry of the order in which Petitioners had to file a petition which conformed to Rule 39.

On November 12, 1976, Petitioners refiled their Petition for Writ of Certiorari in conformity with Rule 39.

COUNTER-SUPPLEMENTAL STATEMENT OF THE CASE

Although Petitioners deem their petition adequate, they think that it is desirable to reply to Respondent Michigan State Housing Development Authority's ("MSHDA") inaccuracies, omissions and misstatements in its "Statement of the Case."

For a correct statement of the case, Petitioners refer this Court to their Statement of the Case in their Petition.

MSHDA states that it loaned to Second

Avenue $1,798,000.00 in 1972. (MSHDA Br. p. 4). However, in truth, HUD and MSHDA committed to loan to Second Avenue $1,798,000.00, but disbursed only $908,539.53 as admitted in MSHDA's Complaint for Foreclosure. Less than one-third of the disbursed sum was paid to or on behalf of Second Avenue for rehabilitating the Second-Hendrie Project. The balance of the loan commitment has not been disbursed and MSHDA's failure and refusal to disburse the balance of the loan commitment is one of Petitioners' causes of action alleged in Count II of the First Amended Complaint.

MSHDA asserts that the charges in the First Amended Complaint "were first contained in a counterclaim filed in response to a complaint filed in the Wayne County Circuit Court." This

statement is untrue. A comparison of the First Amended Complaint with the Counterclaim and Complaint filed in the District Court below clearly reveals that the Counterclaim and Complaint alleges different causes of action, involves different parties plaintiffs, and was predicated on different legal theories.

Furthermore, MSHDA acknowledges that the Authority's important public function includes the raising of money by the sale of bonds and notes to make loans to finance the construction and rehabilitation of housing for persons of low or moderate income. (MSHDA Br. p. 4). However, the gravamen of Petitioners' action below was the disputes between Second Avenue, the sponsor and developer of the Second-Hendrie Project et al, an all Black group, and the overwhelmingly white administered federal and state respondents.

Substantial issues on appeal result from an attempt by the federal judiciary to resolve the controversy between the parties by becoming embroiled in the racial passions raised by the cases below and by predicating their decision, in substantial part, on political, economic and social concerns and interests of MSHDA and Federal Respondents which were not contained in the pleadings on which the courts purported to base their judgment. See Petition at pp. 63 - 64.[1/]

To the contrary, MSHDA and Federal Respondents' past and present actions have resulted in racially discriminatory housing practices affecting at least 13,247 units of multi-family housing in the Metropolitan Detroit area as of December 31, 1974. Approximately 23% (3,000) units were

[1/] Also, see Appendix to Petition, p. 12.

located within the ghetto areas of the City of Detroit. Of the total MSHDA assisted projects in default, MSHDA instituted foreclosure of only one project, namely: Second-Hendrie Project. Of the 260 Section 236 Projects in the Metropolitan Detroit area, 99 (or 38% as of 1975) were in some stage of default and another 46 (or 18%) had financial difficulties. Of the 169 Detroit MSHDA/HUD projects, in 1975, 69% were in default. (Paragraph 48 of First Amended Complaint).

The manner in which Federal Respondents and MSHDA have carried out their important public functions are exemplified by a series of newspaper articles published by the Detroit News.

In the Friday, January 7, 1977 issue of the Detroit News (Sixth in a series), captioned "A $33-million Housing Waste" staff writers David Ashenfelter and Clark Hallas reported that:

> "Federal housing officials have a perfect batting average with 'Operation Rehab.'
> Zero.
> Of 24 Detroit inner-city apartment projects rehabilitated in the $33.2-million program:
> -Six were never finished.
> -Thirteen either have been repossessed -- or eventually will be -- because their owners quit paying their federally insured mortgage notes.
> -Five more are operating in the red and will crumble to ruins long before their 40-year mortgage notes are paid off, according to federal officials.
> By the time the U.S. Department of Housing and Urban Development (HUD) finishes counting the losses, the waste probably will top $30 million.
>
> * * *
>
> It was a social rip-off,' says Robert Koenig, loan

> management chief of HUD's Housing Management Division in Detroit.
> 'People's hopes were raised, then dashed by the program. In the long run, the social losses will be the more costly part of the equasion.
>
> * * *
>
> HUD didn't monitor the work, or provide full-time construction aid, he [Robert Koenig] said.
>
> * * *
>
> Councilman Hood says his projects ran into trouble because HUD deliberately under-capitalized them.
> 'I think it was part of a grand plan to get the buildings off the hands of their white slumlords and turn them over to blacks who thought they were getting something and were left holding the bag,' he said."

Messrs. Ashenfelter and Hallas further wrote in the Tuesday, January 4, 1977 issue of the Detroit News (Third in a series)

entitled "HUD Mired in Own Mistakes,"

that:

> "And, although federal auditors repeatedly told the U.S. Department of Housing and Urban Development (HUD) to clean up its act, a congressional committee investigating the agency's housing fiasco claims the biggest problem is that its policy-makers don't listen to advice.
>
> Federal audits which are two, three or four years old 'read like they were written only yesterday,' the House Committee on Government Operations complained recently.
>
> 'For too long,' the committee noted, 'the department has tolerated inefficiency, conditions conducive to corruption and exploitation of its programs.'

* * *

Nearly one-third of the 684 Detroit-area apartment projects are on the financial ropes and 100 probably will fair, costing the taxpayers from $104 million to $182 million. That doesn't count $20 million already

lost.

Nationally, the losses already have topped $141 million, while $5.8 billion worth of projects are in trouble.

* * *

-Tenants in low-income projects were paying higher rents and getting less for their money than tenants in conventional projects. HUD sloppiness caused low-income tenants to pay rents 59 percent to 93 percent more than tenants in conventional housing.

* * *

-Most HUD field offices routinely overestimated project income and underestimated expenses, driving many projects broke before they opened. That's a key reason why all 24 of Detroit's 'Operation Rehabilitation' projects, renovated under a special subsidy program, are failing."

In the Wednesday, January 5, 1977 issue of the Detroit News (Fourth in a series), captioned "Young one of HUD Defaulters," Messrs. Halles

and Ashenfelter reported that:

> "Four apartment buildings which Young's Eastside Development Corp. acquired and rehabilitated in 1971 and 1972 have been seized by federal housing authorities for failure to make mortgage payments.
>
> * * *
>
> Nationally, losses will be in the billions.
> Ironically, Young has been a strong critic of HUD and, at one time, President-elect Jimmy Carter considered him as a candidate to run the department. Young said he removed himself from contention for the Cabinet appointment."

In contrast, the Sunday, January 9, 1977 issue of the Detroit News (Eighth in a series), captioned "How a bad Deal Ripped off HUD," Messrs. Ashenfelter and Hallas reported that:

> "Henry Ford II and Flint millionaire C. S. Harding Mott have at least two things in common with the U.S.

> Department of Housing and Urban Development:
> 1. Maurice B. Frank, a wheeler-dealer from Palm Beach, Fla.
> 2. Mansion House Center, the $45-million luxury apartment complex which Frank has succeeded in ripping off at public expense.
>
> * * *
>
> But instead of foreclosing on the project and auctioning it to the highest bidder -- which would have resulted in a projected $7-million loss and ended the tax shelter -- HUD let the owners continue to run it.
>
> * * *
>
> The partnership consisted of Henry Ford II; his brother, Benson; his daughters, Charlotte Ford and Anne F. Uzielli; his sister, Josephine; and his mother, the late Eleanor Clay Ford.
>
> * * *
>
> HUD attorney William G. Dunnells helped Frank persuade the agency to postpone mortgage payments for the next five years (until Aug. 31, 1977) so the project could get

into the black. Six months later, Dunnells quit HUD and went to work for Frank on a $2,500 monthly retainer.

* * *

The grace period added $9 million in interest to the mortgage, boosting HUD's liability to $45 million."

ARGUMENT

I

THE BRIEF OF RESPONDENT MICHIGAN STATE HOUSING DEVELOPMENT AUTHORITY IN OPPOSITION WAS NOT FILED TIMELY

Michigan State Housing Development Authority ("MSHDA") filed its Brief under date of December 15, 1976. As admitted by MSHDA in its Brief, the Petition for Certiorari, as conformed to Rule 39, was docketed in this Court on November 12, 1976. MSHDA's thirty day period in which to file its opposition brief expired

on December 12, 1976.

The period in which MSHDA may have filed its brief in opposition to the Petition for Writ of Certiorari has not been enlarged by the Court or a Justice thereof, or by the Clerk under the provisions of Rule 34.5.

Accordingly, MSHDA's Brief in Opposition to Petitioners' Petition for Writ of Certiorari was not timely, and should not be considered by this Court.

ARGUMENT

II

SINCE THE PETITION FOR WRIT OF CERTIORARI WAS TIMELY FILED, THIS COURT HAS JURISDICTION OF THIS APPEAL

In the case below, a timely Petition for Rehearing <u>En Banc</u> was denied by the Court of Appeals for the Sixth Circuit

on May 25, 1976. On August 19, 1976, Petitioners filed their Petition for Writ of Certiorari and Motion for Leave to Proceed In Forma Pauperis and Motion for Order Dispensing of Printing Requirements in full conformity with Rule 53 of the Revised Rules of the Supreme Court of the United States and 28 U.S.C. §1915.

It is the well-settled law of this Court that a timely petition for re-hearing tolls the running of the ninety day period prescribed in 28 U.S.C. §2101(c) in which a petitioner may apply to this Court for a Writ of Certiorari. Department of Banking v. Pink, 317 U.S. 264, 266 (1942); Pfister v. Northern Illinois Finance Corp., 317 U.S. 144, 149-150 (1942); Foreman v. United States, 361 U.S. 416, 426 (1959); United States v. Healy, 376 U.S. 75, 77-80 (1964).

In the case before this Court, the ninety day period did not expire until August 24, 1976.

The Petition for Writ of Certiorari being actually filed on August 19, 1976, was timely. Therefore, the Federal Respondents and MSHDA's contentions of untimeliness are clearly frivolous.

In the instant case, Petitioners followed the instructions of the Clerk of the Court in the preparation and filing of Second Avenue's Motion for Leave to Proceed In Forma Pauperis and Motion for Order Dispensing of Printing Requirements, which were accompanied by a Petition for Writ of Certiorari. (Petitioners' Reply, pp. 1 and 2, supra). The Clerk's instructions were clearly in accordance with the principles of

Snider v. All State Administrators, Inc., 414 U.S. 685, 39 L.Ed.2d 90, 94 S.Ct. 771 (1974).

Although the Clerk of this Court advised Petitioners that this Court would enter its order upon the disposition of Second Avenue's Motion for Leave to Proceed In Forma Pauperis and Motion for Order Dispensing of Printing Requirements stating the time in which Petitioners would be required to file a petition in conformity to Rule 39, the Court did not do so. Accordingly, since Petitioners re-filed their Petition for Writ of Certiorari in conformity with Rule 39 within thirty-six days after the entry of the Order by this Court denying Second Avenue permission to proceed in forma pauperis or in the alternative to dispense with printing

the petition, Petitioners acted within a reasonable period of time. Cf. Snider v. All State Administrators, Inc., supra; Maness v. Meyers, 415 U.S. 909, 39 L.Ed.2d 464, 94 S.Ct. 1403 (1974); Martin-Trigona v. Supreme Court of Illinois, 415 U.S. 910, 39 L.Ed.2d 465, 94 S.Ct. 1404 (1975).

Assuming arguendo that Petitioners' re-filing of the Petition for Writ of Certiorari on November 12, 1976 was not treated as being filed retroactive to August 19, 1976, the telephone conferences with the Clerk of this Court and Petitioners' letter in conformity thereof constituted in substance the granting by the Clerk of this Court of an extension of time in which Petitioners could re-file their Petition for Writ of Certiorari in conformity with Rule 39. Supreme Court Rule 34.4

and .5. Also cf. Morningside Renewal Council, Inc. v. Atomic Energy Commission, 414 U.S. 1153, 39 L.Ed.2d 106, 94 S.Ct. 909 (1974). Thus, Petitioners' Petition for Writ of Certiorari was filed timely and in complete conformance with Rule 53 of the Revised Rules of the United States Supreme Court, 28 U.S.C. §1915 and 2101(c).

ARGUMENT

III

PETITIONERS HAVE SHOWN SUBSTANTIAL BASIS FOR GRANTING CERTIORARI

Without any cogent argument or citation of authorities to support its position,[2/] MSHDA states in a

[2/] MSHDA's reliance on the Federal Power Commission and Federal Trade Commission (cases cited at p. 7 of its brief) is misplaced. These cases are factually distinguishable. The petition in Fed. Trade Comm'n v. Minn. Honeywell Regulator Co., 344 U.S. 206 (1952) (Cont.)

conclusionary manner that Petitioners have shown no basis for granting a Writ of Certiorari. To the contrary, the petition presents special and important reasons for this Court to grant the Writ of Certiorari within the purview of Rule 19.1(a) and (b).[3/] See Petition at p. 23 - 65.

MSHDA's assertion (MSHDA Br. p. 8-9) that Petitioners tacitly admit that Warth v. Seldin, 422 U.S. 490 (1975) is conclusive to Petitioners' alleged lack

[2/] (Cont.) was untimely because the petitioner did not file a timely petition for rehearing. 344 U.S. at p. 213. The petition in Fed. Pow. Comm'n v. Idaho Pow. Co., 344 U.S. 17 (1952)(at pp. 19-20) was held timely because the petition for rehearing was entertained and considered on the merits. 344 U.S. at p. 21.

[3/] This case involves allegations of segregation occurring within Federal and MSHDA housing programs and federally supervised to achieve national housing objectives. See note 5, infra. The Detroit News articles demonstrate the importance of the questions presented by the petition.

of standing defies comprehension. To the contrary, throughout the proceedings below and in their petition, they assert that Warth v. Seldin is distinguishable and not apposite to the issues raised on appeal. (Petition pp. 30-33).

Furthermore, MSHDA purports to rewrite the decision of this Court in Hills v. Gautreaux, 425 U.S. 284, 96 S.Ct. 1538 (April 20, 1976) and the Third Circuit's decision in Shannon v. HUD, 436 F.2d 809 (3rd Cir. 1970) by asserting that neither the factual nor the legal issues involved therein are remotely similar to the case at hand. Nothing could be more inaccurate. See Petition at pp. 23-30 and the lower court decisions cited in the Hills case.

This transparent revision reflects MSHDA's consistent reluctance to accept

this Court's premise in the Hills case that this Court will not countenance racially discriminatory public housing practices by HUD or any public housing authority. The focus of the Hills decision was a blanket proscription against discrimination in federal and state assisted housing projects.

MSHDA's attempt to shift the Court's attention from the substantial and important questions presented by the petition exemplifies the flaw in MSHDA's opposition to the petition. If Warth v. Seldin could be rewritten to support MSHDA's contentions, then the legislative intent in enacting the various housing and civil rights acts and this Court's holding in the Hills case would

be completely frustrated.[4] In substance, MSHDA asks this Court to countenance apartheid in the HUD and MSHDA assisted low to moderate housing programs in the ghetto areas of the City of Detroit, Michigan.[5]

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[4] The questions presented in the petition are of great public importance, particularly to participants and recipients under the federally assisted Section 236 (Rehab) program. The $33.2-million housing waste should be an embarrassment to MSHDA and Federal Respondents. See petitioners' Reply, pp. 8-14, supra.

[5] The National Housing objectives which guide HUD's administration of federal housing laws are found in a number of statutes to be read in pari materia. Shannon v. HUD, 436 F.2d at 817. See 42 U.S.C. 3601, 1401, 1402(2), 1437, 3608(d)(5), 2000d and 5301(c)(6). The Second Annual Report on National Housing Goals of the President says:

"It is imperative to reverse the trend toward a society that is becoming geographically divided not only on a racial basis but on economic and social basis as well. There must be an end to the concentration of the poor in land-short central cities and their inaccessibility to the growth of employment opportunities in suburban areas." House Document No. 91-292, 91st Cong. 2d Sess., U.S. Govt. Printing Office, April 2, 1970, pp. 20-21.

Federal Respondents, by opposing the petition only on a procedural ground, have implicitly confessed the merits of the Petition for Writ of Certiorari. Hence, the importance and substantiality of the questions presented have not been denied by Federal Respondents.

In light of the inability of MSHDA to face the issues presented in the petition without grossly distorting the application of Warth, Hills and Shannon, the need for plenary review of the judgment and opinion below is indisputable.

Although MSHDA asserts that the only real claim presented is that this Court assist Petitioners' efforts to delay foreclosure of the mortgage which has been in default since 1972, approximately two years later MSHDA has not

taken one step in an attempt to prosecute its foreclosure action. The failure of MSHDA to act on its frivolous foreclosure action is understandable since as of 1975 the only Section 236 (Detroit Rehab) Project against which MSHDA and HUD had commenced foreclosure proceedings was the Second-Hendrie Project. See Petitioners' Reply, pp. 6 and 7, supra. All of the other MSHDA/HUD assisted Section 236 (Detroit Rehab) Projects are substantially owned, controlled or administered by whites, and although they have been in default for years, no foreclosure proceedings have been instituted by MSHDA against these whites.[6/] These practices by MSHDA

6/ Compare foreclosure action taken by MSHDA/HUD against Young, a black, with the HUD work-out plan for Henry Ford II et al. See Petitioners' Reply, pp. 12 - 14, supra.

are claimed by Petitioners to be violative of the housing and civil rights acts and U.S. Const. Ams. XIV and XV. See Petitioners' Reply, pp. 6 and 7, supra. Also, see Petition, pp. 4-16.

As MSHDA well knows, it has no reasonable basis for opposing the petition and its opposition is an attempt to continue its illegal and unconstitutional racially discriminatory housing practices in the ghetto areas of the City of Detroit or the Metropolitan area of the City of Detroit.

The effect of the judgments and decisions below, which were expressly or implicitly based in substantial part on political, economic and social concerns neither raised in the pleadings nor supported by a scintilla of

evidence in the record, constitute a deprivation of Petitioners' rights, privileges or immunities afforded under U.S. Const. Ams. V and XIV.[7/]

It is well recognized by this Court that courts have an obligation to insure that constitutional bounds are not overreached. While acting as judges, courts may not act in the same manner as legislators. Courts are not representative bodies and are not designed to be reflective of a democratic society. Their essential

7/ Petitioners submit that the judgment and opinion below will hamper the congressionally mandated objectives of the HUD/MSHDA Section 236 (Det Rehab) programs. Without intervention by this Court, MSHDA and HUD will continue their discriminatory housing practices in $33.2-million program fiasco in a desperate attempt to preserve and perpetuate apartheid in HUD/MSHDA assisted low to moderate housing programs.

quality is detachment founded upon independence. History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures.[8/] Cf. Dennis v. U.S., 341 U.S. 494, 525, (1971) (Frankfurter, J., concurring in affirmance).

8/ This is a case of far-reaching effect and importance. The evils of apartheid in HUD/MSHDA assisted low to moderate housing programs -- whether the results of illegal and unconstitutional conduct of HUD/MSHDA et al or the result of judicial abuse of discretion -- constitute a clear perversion of the legislative intent of the civil rights and housing acts. Compare Mr. Justice Brennan's dissenting opinion in Simon and Mr. Justice Marshall's plurality opinion in Hospital Building, cited at pp. 43-44 of the petition.

CONCLUSION

For the reasons set forth above as well as those contained in the Petition for Writ of Certiorari, Petitioners pray that this Court grant the Petition and review the judgment and opinion below.

Respectfully submitted,

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